No. 00-276-CFX Title: United States and Department of Agriculture, Petitioners
v.
United Foods, Inc.

Docketed:
August 18, 2000 Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	Jun 8 2000	Application (99A1019) to extend the time to file a petition for a writ of certiorari from June 21, 2000 to July 21, 2000, submitted to Justice Stevens.
	Jun 9 2000	Application (99A1019) granted by Justice Stevens extending the time to file until July 21, 2000.
	Jul 11 2000	Application (99A1019) to extend further the time to file a petition for a writ of certiorari from July 21, 2000 to August 18, 2000, submitted to Justice Stevens.
	Jul 13 2000	Application (99A1019) granted by Justice Stevens extending the time to file until August 18, 2000.
	Aug 18 2000	Petition for writ of certiorari filed. (Response due October 18, 2000)
	Sep 11 2000	Order extending time to file response to petition until October 18, 2000.
	Oct 18 2000	Brief of respondent United Foods, Inc. in opposition filed.
	Nov 1 2000	DISTRIBUTED for Conference of November 22, 2000
	Nov 3 2000	Reply brief of petitioners United States and Department of Agriculture filed.
	Nov 3 2000	LODGING consisting of eleven copies of a letter submitted by the Solicitor General and distributed.
	Nov 27 2000	Petition GRANTED. SET FOR ARGUMENT April 17, 2001. **********
	Dec 21 2000	Order extending time to file petitioners' brief on the merits to and including January 24, 2001. Order extending time to file respondent's brief on the merits to and including March 8, 2001. A reply brief, if any, is to be filed on or before April 9, 2001.
	Jan 24 2001	Brief amici curiae of American Mushroom Institute, et al. filed.
	Jan 24 2001	Joint appendix filed.
	Jan 24 2001	Brief of petitioners United States and Department of Agriculture filed.
	Jan 24 2001	Brief amici curiae of California, et al. filed.
	Jan 24 2001	Brief amici curiae of Western Mushroom Marketing Association, et al. filed.
	Feb 22 2001	CIRCULATED.
	Mar 1 2001	Record filed.
	Mar 2 2001	Letter from counsel for the respondent granting CONSENT to all amici filing in support of the respondent.
	Mar 8 2001	Brief amicus curiae of Washington Legal Foundation filed.
	Mar 8 2001	Brief amicus curiae of DKT Liberty Project filed.
	Mar 8 2001	Brief amicus curiae of Coalition of Cotton Apparel Importers filed.
	Mar 8 2001	Brief of respondent United Foods, Inc. filed.

No. 00-276-CFX

Entry	Date	Proceedings and Orders
	Mar 8 2001	Brief amici curiae of Gerawan Farming, Inc., et al. filed.
	Mar 8 2001	Brief amicus curiae of Center for Individual Freedom filed.
	Mar 8 2001	Brief amicus curiae of Institute for Justice filed.
	Mar 8 2001	Brief amici curiae of Jeanne and Steve Charter, et al. filed.
	Mar 20 2001	Record filed.
	Apr 9 2001	Reply brief of petitioners United States and Department of Agriculture filed.
	Apr 9 2001	LODGING consisting of twelve copies of pamphlet and Mushroom Council Program Effectiveness Review 1999 submitted by the Solicitor General and distributed.
	Apr 17 2001	ARGUED.

Supreme Court, U.S.
FILED
00-276 AUG 18 2000

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS

v.

UNITED FOODS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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48pp

QUESTION PRESENTED

Whether the assessments imposed by the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. 6101 *et seq.*, on members of the mushroom industry for advertising programs designed to support the industry violate the First Amendment.

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS

v.

UNITED FOODS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America and the United States Department of Agriculture, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 197 F.3d 221. The opinion of the district court (App., *infra*, 10a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1999. A petition for rehearing was denied on March 23, 2000 (App., *infra*, 22a-23a). On June

9, 2000, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including July 21, 2000, and, on July 13, 2000, Justice Stevens further extended that time to and including August 18, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech * * *.

2. The relevant provisions of the Mushroom Promotion, Research, and Consumer Information Act of 1990, Subtitle B of Title XIX of the Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, §§ 1921-1933, 104 Stat. 3854-3865 (7 U.S.C. 6101-6112) are reproduced at App., *infra*, 24a-28a.

STATEMENT

This case concerns the constitutionality of a generic advertising program for mushrooms that is similar to the generic advertising programs for California tree fruit upheld in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997). The court of appeals held that the mushroom advertising program violates the First Amendment, distinguishing *Wileman Brothers* on the ground that mushrooms are not subject to federal regulation that is as extensive as that applicable to California tree fruit.

1. Congress enacted the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. 6101-6112 (Mushroom Act), after finding that "the maintenance and expansion of existing markets

and uses" for mushrooms are "vital to the welfare of producers and those concerned with marketing and using mushrooms, as well as to the agricultural economy of the Nation." 7 U.S.C. 6101(a)(5). Congress determined that the market for mushrooms could most effectively be maintained and expanded through "the cooperative development, financing, and implementation of a coordinated program of mushroom promotion, research, and consumer information." 7 U.S.C. 6101(a)(6).

To that end, the Mushroom Act authorizes the Secretary of Agriculture to issue an order establishing a Mushroom Council that would, *inter alia*, propose to the Secretary "projects of mushroom promotion, research, consumer information, and industry information." 7 U.S.C. 6104(c)(4).[1] The Mushroom Act provides that any such projects would be funded through assessments collected from mushroom producers and importers for the domestic fresh-mushroom market. 7 U.S.C. 6104(g)(1)(A) and (B).[2] The Mushroom Act expressly prohibits the use of the assessments "in any manner for the purpose of influencing legislation or governmental action or policy." 7 U.S.C. 6104(h).[3]

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[1] The Mushroom Act provides that the Mushroom Council is to be composed of persons nominated by mushroom producers and importers and selected by the Secretary. 7 U.S.C. 6104(b)(1) and (2).

[2] The Mushroom Act provides that the assessment is to be based on the quantity of mushrooms produced or imported. 7 U.S.C. 6104(g)(2).

[3] The assessments may be used, however, to develop proposals to the Secretary for amendments to the Mushroom Order or for voluntary grade and quality standards for mushrooms. 7 U.S.C. 6104(h).

The Secretary of Agriculture issued an order, pursuant to the Mushroom Act, that took effect in 1993. See 7 C.F.R. Pt. 1209 (Mushroom Order). Before the Mushroom Order took effect, the Secretary submitted the Order to a referendum of mushroom producers and importers, as required by the Mushroom Act. 7 U.S.C. 6105(a). The Mushroom Act also required the Secretary to conduct a second such referendum after the Mushroom Order had been in effect for five years. 7 U.S.C. 6105(b)(1)(A). In that referendum, which was conducted in 1998, a substantial majority of mushroom producers and importers voted to retain the Mushroom Order. App., *infra*, 15a.[4] The Secretary is also authorized to conduct additional referenda on the Mushroom Order if 30% of the mushroom producers and importers request one. 7 U.S.C. 6105(b)(1)(B).

2. Respondent United Foods, Inc., a mushroom producer, has refused since 1996 to pay its assessments under the Mushroom Act and the Mushroom Order. C.A. App. 12; see App., *infra*, 15a. Instead, respondent filed a petition with the Secretary of Agriculture, pursuant to 7 U.S.C. 6106(a), claiming that the Mushroom Act, the Mushroom Order, and the assessments imposed thereunder violate the First Amendment. C.A. App. 93, 98. The United States then filed an action against respondent in district court, pursuant to 7 U.S.C. 6107(a), seeking to enforce the terms of the Mushroom Order and to require respondent to comply

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[4] In 1998, 80% of those voting in the referendum, representing 70% of the volume of mushrooms produced by all those who voted, favored the continuation of the Mushroom Order. Agricultural Marketing Serv., United States Dep't of Agriculture, *Mushroom Industry Votes to Continue Promotion Program*, Release No. AMS-071-98 (Mar. 20, 1998).

with it. C.A. App. 9. The two actions were stayed in their respective fora pending this Court's resolution of *Wileman Brothers*. App., *infra*, 11a.

After the decision in *Wileman Brothers*, the administrative law judge assigned to respondent's case dismissed the petition, rejecting the argument that *Wileman Brothers* "is distinguishable because the peach and nectarine marketing orders at issue there regulated other aspects of the market, and did not have promotion as their sole purpose." C.A. App. 249.

The Judicial Officer of the Department of Agriculture affirmed. The Judicial Officer explained that the Mushroom Act and the Mushroom Order "have the very same three characteristics which the Court found dispositive of the First Amendment issue in [*Wileman Brothers*]." C.A. App. 274. Specifically, the Judicial Officer explained, the Mushroom Act and the Mushroom Order do not prohibit respondent from communicating any message to any audience, do not compel respondent to speak or be publicly associated with the Mushroom Council's promotion program, and do not compel respondent to finance any political or ideological views. *Id.* at 274-276.

Respondent then filed a complaint in district court. The court consolidated that action with the United States' enforcement action, and granted the United States' motions for summary judgment. App., *infra*, 10a-21a. The court held that *Wileman Brothers* "is clearly dispositive of [respondent's] First Amendment challenge to the [Mushroom Act] and the Order." *Id.* at 18a. The court rejected respondent's effort to distinguish *Wileman Brothers* on the ground that the mushroom industry is not as extensively regulated as the tree fruit industry. The court reasoned that *Wileman Brothers* "did not turn on the degree to which [the]

State or Federal Government has otherwise displaced free market competition"; rather, the court understood *Wileman Brothers* as holding that "compelled participation in a generic advertising program is itself a form of economic regulation whose efficacy is to be judged by legislatures, Government officials and producers, and not by the Court." *Ibid.* (quoting *Matsui Nursery, Inc.* v. *California Cut Flower Comm'n*, No. S-96-1012 EJG/GGH (E.D. Cal. Aug. 6, 1997), slip op., 12-13).

3. The United States Court of Appeals for the Sixth Circuit reversed. App., *infra*, 1a-9a. The court concluded that the Mushroom Act and the Mushroom Order violate the First Amendment to the extent that they require mushroom producers and importers to pay an assessment for a generic advertising program. *Id.* at 8a-9a.

The court of appeals read *Wileman Brothers* as holding that a generic advertising program funded by mandatory assessments must satisfy two conditions in order to withstand constitutional scrutiny: first, the advertising must be "germane[] to a valid, comprehensive, regulatory scheme," and, second, the advertising must be "nonideological." App., *infra*, 7a. The panel noted that *Wileman Brothers* had emphasized that the generic advertising program for California tree fruit possessed both characteristics—that is, the advertising program was "part of a broader collective enterprise in which [the producers'] freedom to act independently is already constrained by the regulatory scheme," *id.* at 5a (quoting *Wileman Bros.*, 521 U.S. at 469), and was "not

used to fund ideological activities," *id.* at 6a (quoting *Wileman Bros.*, 521 U.S. at 473).[5]

The court of appeals then applied its two-part test to the generic advertising program established by the Mushroom Act and the Mushroom Order. App., *infra*, 8a-9a. The court did not suggest that the generic advertising program compels members of the mushroom industry to fund ideological activities. But the court nonetheless concluded that, because the generic advertising program is not part of a comprehensive scheme of regulation of the mushroom industry, the program violates the First Amendment to the extent that it imposes assessments on members of the industry. *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals has held unconstitutional the assessment provisions of the Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. 6101 *et seq.*, and the Mushroom Order promulgated by the Secretary of Agriculture thereunder, as a law "abridging the freedom of speech" within the meaning of the First Amendment. U.S. Const. Amend. I. That decision misconstrues this Court's precedents, including *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), and places unwarranted restrictions on

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[5] The court of appeals reasoned that mandatory advertising assessments are justified in an extensively regulated industry, but not otherwise, in order to prevent members of the industry from "tak[ing] advantage of their monopoly power resulting from regulation of price and supply without paying for whatever commercial benefits [they] receive at the hands of the government." App., *infra*, 7a-8a. The court found support for such a "principle of reciprocity" in *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991), which involved compelled contributions to a public-employee union in the context of an "agency-shop" arrangement. App., *infra*, 8a.

Congress's authority to engage in "a species of economic regulation," *id.* at 477, designed to stabilize and strengthen the market for an agricultural commodity. Certiorari is warranted to review the court of appeals' "exercise of the grave power of annulling an Act of Congress," *United States* v. *Gainey*, 380 U.S. 63, 65 (1965), and to resolve disagreement among the lower courts concerning the constitutionality of generic advertising programs for various agricultural commodities.

1. In *Wileman Brothers*, this Court rejected a First Amendment challenge to the generic advertising programs for California peaches, plums, and nectarines authorized by the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.* Those generic advertising programs, like the generic advertising program for mushrooms in this case, were funded by mandatory assessments imposed on producers or handlers of the commodities. The Court concluded that the generic advertising programs in *Wileman Brothers* were subject to scrutiny not under the "heightened standard appropriate for the review of First Amendment issues," but instead under the more deferential standard "appropriate for the review of economic regulation." 521 U.S. at 469.

The Court identified three characteristics that distinguish such generic advertising programs from laws that abridge the freedom of speech protected by the First Amendment: *first*, the programs "impose no restraint on the freedom of any producer to communicate any message to any audience"; *second*, the programs "do not compel any person to engage in any actual or symbolic speech"; and, *third*, the programs "do not compel the producers to endorse or to finance any political or ideological views," much less views with which they

disagree. *Wileman Bros.*, 521 U.S. at 469-470; see also *id.* at 470-472. Accordingly, the Court concluded that "none of our First Amendment jurisprudence provides any support for the suggestion that the promotional regulations should be scrutinized under a different standard" from that applicable to other economic regulations. *Id.* at 470.

Here, based on the same three distinctions identified by the Court in *Wileman Brothers*, the generic advertising program for mushrooms is unlike laws that have been held to violate the First Amendment. The Mushroom Act and the Mushroom Order do not restrain the freedom of respondent or other producers "to communicate any message to any audience," do not compel respondent or other producers "to engage in any actual or symbolic speech," and do not require respondent or other producers "to endorse or to finance any political or ideological views." *Wileman Bros.*, 521 U.S. at 469-470. They merely require respondent and other producers to share in the costs of commercial messages, without any ideological content, that are germane to the statutory purpose of "maintain[ing] and expand[ing] existing markets for mushrooms." 7 U.S.C. 6101(a)(6). See *Wileman Bros.*, 521 U.S. at 473 (explaining that the marketing orders in that case did not implicate the First Amendment's concern with compelled funding of certain speech because "(1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, (2) in any event, the assessments are not used to fund ideological activities"). On that basis, the court of appeals should have concluded that the generic advertising program in this case, like the generic advertising programs in *Wileman Brothers*, is "a species of economic regulation that should enjoy the same strong

presumption of validity that we accord to other policy judgments made by Congress." *Id.* at 477.

The court of appeals nonetheless departed from the holding in *Wileman Brothers* on the ground that the mushroom industry is "unregulated" whereas the California peach, plum, and nectarine industries are "collectivized." App., *infra*, 8a. This Court's analysis in *Wileman Brothers* did not, however, center on the extent to which those industries were regulated. To be sure, the Court did "stress the importance of the statutory context" in which *Wileman Brothers* arose, noting that the advertising programs were "a part of a broader collective enterprise in which [fruit growers'] freedom to act independently is already constrained by the regulatory scheme." 521 U.S. at 469. But that discussion was in Part III of the Court's opinion, which essentially identified what was and was not at issue in the case, see *id.* at 467-468, and described the context in which the case arose, see *id.* at 469. The Court's First Amendment analysis, on the other hand, was set forth in Part IV of the Court's opinion. See *id.* at 469-474. None of the three grounds on which the Court, in Part IV, distinguished the law in *Wileman Brothers* from laws that violate the First Amendment has anything to do with the "collectiviz[ation]" of the industry subject to the law. Presumably, if the Court had intended its decision in *Wileman Brothers* to turn on the extent of regulation of the industry at issue, the Court would not merely have stated as a fact that the California tree fruit industry was extensively regulated, but would also have explained the significance of such a fact to its First Amendment analysis.

Moreover, the Court granted certiorari in *Wileman Brothers* to resolve a conflict between the Ninth Circuit's decision in that case and the Third Circuit's deci-

sion in *United States* v. *Frame*, 885 F.2d 1119 (1989), cert. denied, 493 U.S. 1094 (1990). See *Wileman Bros.*, 521 U.S. at 466-467. *Frame*, like the present case, involved a First Amendment challenge to a generic advertising program established pursuant to a statute —there, the Beef Promotion and Research Act of 1985, 7 U.S.C. 2901 *et seq.* (Beef Act)—that does not extensively regulate the relevant sector of the agricultural industry. The Beef Act, like the Mushroom Act, is concerned solely with "promotion and advertising, research, consumer information, and industry information" funded through assessments on producers. 7 U.S.C. 2904(4)(B); see *Frame*, 885 F.2d at 1122 (The Beef Act "was structured as a 'self-help' measure that would enable the beef industry to employ its own resources and devise its own strategies to increase beef sales, while simultaneously avoiding the intrusiveness of government regulation and the cost of government 'handouts.'"). If the Court's decision in *Wileman Brothers* were limited to generic advertising programs imposed under marketing orders comprehensively regulating a commodity, then the circuit conflict that the Court identified in *Wileman Brothers* would not have been resolved.

2. Quite aside from the Third Circuit's pre-*Wileman Brothers* decision in *Frame*, the court of appeals' decision in this case conflicts with the Tenth Circuit's post-*Wileman Brothers* decision in *Goetz* v. *Glickman*, 149 F.3d 1131 (1998), cert. denied, 525 U.S. 1102 (1999), which rejected a First Amendment challenge to the generic advertising program established pursuant to the Beef Act. The plaintiff in *Goetz* argued that *Wileman Brothers* was inapplicable because the Beef Act "is not an overall regulatory scheme" and the beef industry remains "highly competitive." Appellant's

Supp. Br. at 6, *Goetz*, *supra*.[6] The Tenth Circuit summarily concluded, however, that "under the Supreme Court's decision in *Wileman Bros.*, [the plaintiff's] First Amendment claim is fruitless." *Goetz*, 149 F.3d at 1139.

The Ninth Circuit, somewhat similarly to the Sixth Circuit, has read *Wileman Brothers* to require an analysis of whether producers are being compelled to fund a generic advertising program "as a part of a broader collective enterprise in which their freedom to act independently is already constrained." *Gallo Cattle Co.* v. *California Milk Advisory Bd.*, 185 F.3d 969, 975 (1999) (quoting *Wileman Bros.*, 521 U.S. at 469). The Ninth Circuit further explained that such an analysis should be based on "the entire regulatory scheme" applicable to a given commodity, and not merely the particular statute or marketing order that establishes a generic advertising program. *Id.* at 975 & n.5. The court thus rejected the plaintiff's argument that *Wileman Brothers* was inapplicable to the state marketing order in that case, which did no more than establish a collective advertising and information program for milk and dairy products, because "California milk producers are regulated to the same extent as, if not more than, the tree fruit growers in *Wileman*," albeit not under the particular marketing order at issue. *Id.* at 974.

3. The court of appeals' decision significantly undermines the nationwide generic advertising program for mushrooms—a program that Congress determined to be "necessary to maintain and expand existing markets

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[6] This Court decided *Wileman Brothers* while *Goetz* was pending on appeal. The Tenth Circuit directed the parties to file supplemental briefs "addressing the effect of [*Wileman Brothers*] on Goetz's first amendment claim." *Goetz*, 149 F.3d at 1135.

for mushrooms," and thus "vital to the welfare of producers * * * as well as to the agricultural economy of the Nation." 7 U.S.C. 6101(a)(5) and (6). It exempts mushroom producers and importers in the Sixth Circuit from contributing to the generic advertising program. It also encourages mushroom producers and importers outside the Sixth Circuit to withhold their payments until the constitutionality of such programs is definitively resolved. As this Court recognized with respect to another type of agricultural marketing program supported by assessments on handlers of a commodity, "[f]ailure by handlers to meet their obligations [to pay] promptly would threaten the whole scheme," and "[e]ven temporary defaults by some handlers may work unfairness to others, encourage wider non-compliance, and engender those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements." *United States* v. *Ruzicka*, 329 U.S. 287, 293 (1946).

In addition to the generic advertising program for mushrooms, Congress has authorized, and the Secretary of Agriculture has implemented, similar generic advertising programs for a number of other agricultural commodities. Those programs, like the program in this case, are not imposed as part of a statute or marketing order that comprehensively regulates the commodity. See, *e.g.*, 7 U.S.C. 2101 *et seq.* (cotton); 7 U.S.C. 2611 *et seq.* (potatoes); 7 U.S.C. 2701 *et seq.* (eggs); 7 U.S.C. 2901 *et seq.* (beef); 7 U.S.C. 4501 *et seq.* (dairy products); 7 U.S.C. 4801 *et seq.* (pork); 7 U.S.C. 6401 *et seq.* (fluid milk).[7] Moreover, Congress recently enacted a statute,

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[7] See also, *e.g.*, 7 U.S.C. 4601 *et seq.* (honey); 7 U.S.C. 4901 *et seq.* (watermelon); 7 U.S.C. 6301 *et seq.* (soybeans); 7 U.S.C. 7481 *et*

7 U.S.C. 7411 *et seq.* (Supp. IV 1998), that authorizes marketing programs for any agricultural commodity, under which generic advertising programs have recently gone into effect for peanuts, 7 C.F.R. Pt. 1216, and blueberries, 7 C.F.R. Pt. 1218. Several States have established their own commodity marketing programs, some of which could be categorized as involving only generic advertising funded through assessments on producers of the commodity. See, *e.g.*, Br. of Amici Curiae Attorneys General of Arizona *et al.* in Support of Petition for Writ of Certiorari at 1-3 & App. 1-4, *Wileman Bros.*, *supra* (describing commodity marketing programs in 11 States); see, *e.g.*, *Gallo Cattle Co.*, 185 F.3d at 974-978 (upholding generic advertising program established under state marketing order).

We do not mean to imply that all of those programs would necessarily be invalidated under the Sixth Circuit's analysis in this case.[8] At a minimum, however, the Sixth Circuit's decision creates considerable uncertainty about the constitutionality of other federal and state generic advertising programs, thereby complicat-

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seq. (popcorn). Additional such programs, although authorized by Congress, are not currently in effect. See, *e.g.*, 7 U.S.C. 6001 *et seq.* (pecans); 7 U.S.C. 6201 *et seq.* (limes); 7 U.S.C. 6801 *et seq.* (cut flowers); 7 U.S.C. 7101 *et seq.* (sheep and sheep products); 7 U.S.C. 7441 *et seq.* (canola and rapeseed) (Supp. IV 1998); 7 U.S.C. 7461 *et seq.* (Supp. IV 1998) (kiwi fruit).

[8] For example, under the analysis employed by the Ninth Circuit in *Gallo Cattle*, 185 F.3d at 975 & n.5, courts may consider all federal and state regulation of a commodity, and not merely the statute and order establishing a generic advertising program, to determine whether the commodity is regulated to the same extent as the tree fruit in *Wileman Brothers*. Some generic advertising programs, such as that in *Gallo Cattle* itself, would be sustained under that approach.

ing the administration of such programs, "encourag[ing] wider non-compliance, and engender[ing] those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements," *Ruzicka*, 329 U.S. at 293. Certiorari is warranted here in order to eliminate that broader uncertainty, as well as to review the Sixth Circuit's holding of an Act of Congress unconstitutional and to resolve the circuit conflict that holding has created.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-6436

UNITED FOODS, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF
AGRICULTURE, DEFENDANTS-APPELLEES

[Argued: Sept. 23, 1999
Decided and Filed: Nov. 23, 1999
Rehearing and Suggestion for Rehearing
En Banc Denied March 23, 2000]

OPINION

Before: MERRITT and CLAY, Circuit Judges;
ALDRICH,* District Judge.

MERRITT, Circuit Judge.

In this case of compelled, commercial speech challenged under the First Amendment, the Department of Agriculture requires the plaintiff, a mushroom pro-

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* The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

ducer, to contribute funds for advertising mushrooms, on a regional basis, as authorized by the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101 *et seq.*[1] The District Court upheld

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[1] Enacted by Congress in 1990, the Mushroom Act states:

> It is declared to be the policy of congress that it is in the public interest to authorize the establishment of an orderly procedure for financing through adequate assessments on mushrooms produced domestically or imported into the United States, program of promotion, research, and consumer and industry information designed to–
>
> (1) strengthen the mushroom industry's position in the marketplace;
>
> (2) maintain and expand existing markets and uses for mushrooms; and
>
> (3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101(b). These policy objectives are supported by findings set forth in the Act that mushrooms are not only an important food valuable to the human diet, but that they play a significant role in this country's economy and that their production benefits the environment. The Act does not permit the regulation of prices or mandatory quantity or quality controls of mushrooms produced and sold by farmers, nor does it subsidize or restrict the growth of mushrooms or otherwise collectivize the industry. It is basically a commercial advertising statute designed to assess mushroom growers for the cost of advertising. 7 C.F.R. Part 1209.40(a).

Pursuant to the Mushroom Act, the Secretary of Agriculture promulgated an Order establishing a Mushroom Council made up of mushroom producers nominated by producers and importers for appointment by the Secretary. 7 U.S.C. § 6104(b); 7 C.F.R. Part 1209. The Order generally directs the Council to "carry out programs, plans, and projects designed to provide maximum benefits to the mushroom industry." 7 C.F.R. § 1209.39(l). The Council's activities are funded through mandatory assessments on larger producers

the Act and the government's action compelling payments for mushroom advertising. The plaintiff claims that other mushroom producers shape the content of the advertising to its disadvantage and that the administrative process allows a majority of producers to create advertising to its detriment. The issue before us is whether the answer to the First Amendment question presented here should be the same as in the recent case of *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 117 S. Ct. 2130, 138 L.Ed.2d 585 (1997), in which the Supreme Court in a controversial 5-4 decision[2] upheld a similar agricultural advertising program in the heavily regulated California tree fruits business (peaches, plums and nectarines). But unlike the tree fruit business in *Wileman*, the mushroom growing business in the case before us is unregulated, except for the enforcement of a regional mushroom advertising program.

The government argues that the degree of regulation or "collectivization" of an industry should make no First Amendment difference on the compelled advertising issue so long as the compelled advertising is nonpolitical and so long as the plaintiff is not restricted in its own advertising. The plaintiff contends to the contrary that

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and importers of fresh mushroom products for domestic use, based upon poundage of mushrooms marketed in the United States and not to exceed a penny per pound 7 U.S.C. § 6104(g), 7 C.F.R. § 1209.51. The Council has used these funds solely to finance generic advertising efforts on behalf of the mushroom industry.

[2] *See, e.g.*, Nicole B. Casarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 MO. L. REV. 929 (1998); Leading Case, *Commercial Speech—Compelled Advertising*, 111 HARV. L. REV. 319 (1997).

the constitutionality of the compelled speech under the 1990 Mushroom Act—in light of *Wileman*—must turn on the degree of regulation of the industry. The question for us is whether the degree of government regulation of an industry controls the outcome or whether the government is right that this is irrelevant under *Wileman*.

In prior restraint and compelled speech cases involving nonbroadcast political speech, the First Amendment prohibition is nearly absolute, *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625, 75 L.Ed. 1357 (1931), holding that newspapers have a right to publish without prior restraint, *West Virginia v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L.Ed. 1628 (1943), holding that schoolchildren may not be compelled to join in a flag salute ceremony, and *Miami Herald v. Tornillo*, 418 U.S. 241, 94 S. Ct. 2831, 41 L.Ed.2d 730 (1974), holding that newspapers may not be compelled to publish a reply by political candidates. But commercial speech compelled by government is governed by a different, and as yet unsettled, set of principles which require a court to balance a number of factors according to its judgment concerning the welfare of buyers and sellers in the market place.

In the *Wileman* case, the Supreme Court emphasized and reemphasized that the compelled advertising program for California tree fruits under the Agricultural Marketing Agreement Act of 1937 contemplates "a uniform price to all producers in a particular market," a "policy of collective, rather than competitive, marketing" and an exemption from the antitrust laws in order "to avoid unreasonable fluctuation in supplies and prices." *Wileman*, 521 U.S. at 461, 117 S. Ct. 2130. In

his opinion for five members of the Court, Justice Stevens repeatedly "stress[ed] the importance" of the fact that the advertising takes place "as a part of a broader collective enterprise in which [the producers'] freedom to act independently is already constrained by the regulatory scheme." *Id.* at 469, 117 S. Ct. 2130. In contrast, the mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply. Except for the compelled advertising program assessing growers based on their volume of mushroom production, there appears to be a relatively free market in mushrooms, both processed and fresh.[3]

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[3] Justice Souter's twenty-five page dissenting opinion in *Wileman* provides an extensive history of compelled advertising in the market for agricultural commodities. His reading of the history of the agricultural regulations is that it shows that the advertising is simply the result of interest group lobbying, not a response to economic conditions. See *Wileman*, 521 U.S. at 491-99, 117 S .Ct. 2130 (Souter, J., dissenting). Justice Souter's dissent recounts that in 1952 Congress began providing for compelled advertising for an ever-expanding list of agricultural commodities. Sometimes the legislation, and the marketing orders authorized by the legislation, cover a commodity from just one section of the country—for example, California peaches but not Georgia peaches. In recent years Congress has added many farm products to the list in which compelled advertising is the main or the only form of regulation. Justice Souter explains that this comes about because of "the view of the Department of Agriculture that 'any fruit or vegetable commodity group which actively supports the development of a promotion program by this means should be given an opportunity to do so.'" *Id.* at 495-96, 117 S. Ct. 2130 (citing S. REP. NO. 92-295, at 2 (1971)). Justice Souter concludes that these programs of compelled advertising appear to rest only on "the preference of a local interest group." *Id.* at 497, 117 S. Ct. 2130. "Without more, the most reasonable inference is not of a

On the other side of the ledger, the government correctly argues that Justice Stevens also emphasized repeatedly in his opinion that the compelled agricultural advertising in *Wileman* is not a restriction on commercial advertising as in cases that have invalidated such regulation, *see, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980), because separate, individual, producer advertising of tree fruits is not prohibited or restricted. *See Wileman*, 521 U.S. at 469-70, 117 S. Ct. 2130. The opinion emphasizes that the test for compelled advertising is not the same as the four-part test for restrictions on advertising set out in Central Hudson. *See id.* The government also correctly argues that Justice Stevens repeatedly emphasizes that no "symbolic," "ideological" or "political" speech is involved in the tree fruit advertising. *See id.* Justice Stevens' opinion sets out these various factors concisely when he says that the compelled advertising of tree fruits passes muster "because (1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders [which collectivize the industry] and, (2) *in any event*, the assessments are not used to fund ideological activities." *Wileman*, 521 U.S. at 473, 117 S. Ct. 2130 (emphasis added).

The question for us then is whether these two elements—(1) germaneness to a valid, comprehensive, regulatory scheme and (2) nonideological content—are

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substantial Government interest, but effective politics on the part of producers who see the chance to spread their advertising costs." *Id.* at 498, 117 S. Ct. 2130.

independent of each other and each provide a sufficient basis for upholding compelled commercial speech. In other words, even though the mushroom advertising program before us is not "germane" to any collective program setting prices or supply, does the fact that the advertising is "nonideological" or "nonpolitical" in nature mean that it should be permitted under the First Amendment?

We do not read the majority opinion in *Wileman* as saying that any compelled commercial speech that is nonpolitical or nonsymbolic or nonideological does not warrant First Amendment protection. We conclude that the explanation for the *Wileman* decision is to be found in the fact that the California tree fruit industry is fully collectivized and is no longer a part of a free market, as well as in the nonpolitical nature of the compelled speech. The majority uses this concept of collectivization and the nonideological nature of the advertising together. The conjunction "and"—germaneness "and" nonpolitical—is used in the Court's holding. Our interpretation of *Wileman* is that if either of the two elements is missing—either the collectivization of the industry or the purely commercial nature of the advertising—the First Amendment invalidates the compelled commercial speech, absent some other compelling justification not present in the case before us. The Court's holding in *Wileman*, we believe, is that nonideological, compelled, commercial speech is justified in the context of the extensive regulation of an industry but not otherwise. The purpose of this principle joining regulation and content is to deter free riders who take advantage of their monopoly power resulting from regulation of price and supply without paying for whatever commercial benefits such free riders receive

at the hands of the government. Whether wise or unwise, or true or untrue, the legislative theory behind such extensive regulation is that the interests of producers and consumers are furthered by the monopoly powers inherent in government control of price and supply. In exchange for such power in the market place, members of the industry may have to provide certain benefits to their industry in the form of payments for nonideological advertising of industry products. If an economic actor chooses to remain aloof from the regulated industry, he owes no reciprocal duty to promote the industry; but if he chooses to join, he has a reciprocal duty to promote its interest. This principle of reciprocity designed to control free-ridership is essentially the same basis upon which the Supreme Court upheld some, and struck down other, compelled speech in the union, closed-shop context in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 111 S. Ct. 1950, 114 L.Ed.2d 572 (1991).

Applying this interpretation to the case at hand, we find that the context of the mushroom business is entirely different from the collectivized California tree fruit business. Mushrooms are unregulated. Hence the compelled commercial speech is not a price the members must pay under the reciprocity principle in order to further their self-interest which is regarded as arising from heavy regulation through marketing orders controlling price, supply and quality. Thus in the absence of extensive regulation, the effort by the Department of Agriculture to force payments from plaintiff for advertising is invalid under the First Amendment. The portions of the Mushroom Act of 1990 which authorize such coerced payments for advertising are likewise unconstitutional.

Accordingly, the judgment of the District Court is reversed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

No. 96-1252

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED FOODS, INC., DEFENDANT

No. 98-1082

UNITED FOODS, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: JULY 31, 1998]

ORDER GRANTING UNITED STATES' MOTIONS FOR SUMMARY JUDGMENT

The United States, on behalf of the Department of Agriculture (USDA), filed civil action No. 96-1252 on October 16, 1996, pursuant to the Mushroom Promotion, Research, and Consumer Information Act (MPRCIA), 7 U.S.C. § 6101 *et seq.* The complaint seeks to enforce against United Foods, Inc., a producer and first handler of fresh mushrooms, the terms of an Order issued under the MPRCIA by the Secretary of Agriculture. Already pending when the action was filed was an administrative petition before the USDA on behalf of

United Foods, challenging the constitutionality of the Order. On November 16, 1996, the United States filed a motion for summary judgment or, in the alternative, for a preliminary injunction. United Foods responded with a motion to stay the proceedings in order to await the decision of the United States Supreme Court in a case involving the same issues that United Foods had raised.

On February 11, 1997, the court granted United Foods' motion to stay No. 96-1252. An administrative law judge (ALJ) had also stayed proceedings on the pending administrative petition. The Supreme Court issued its decision in *Glickman v. Wileman Bros. & Elliott*, 117 S. Ct. 2130, on June 25, 1997. The ALJ ruled on December 9, 1997, that *Wileman Bros.* was dispositive of the issues raised by United Foods, and dismissed the administrative petition. United Foods appealed, and a USDA Judicial Officer affirmed. On March 23, 1998, United Foods filed civil action No. 98-1082, seeking judicial review of the USDA administrative decision, pursuant to 7 U.S.C. § 6106(b). The stay in No. 96-1252 was lifted, and upon motion of United Foods, the court consolidated the two cases, as the issues raised are identical. The United States has moved for summary judgment in both cases, and United Foods has responded to the motion.

Motions for summary judgment are governed by Fed. R. Civ. P. 56. If no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Fed. R. Civ. P. 56(c). The moving party may support the motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of

proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but must go beyond the pleadings and "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Celotex Corp.*, 477 U.S. at 323.

In enacting the MPRCIA in 1990, Congress made the following findings:

(1) mushrooms are an important food that is a valuable part of the human diet;

(2) the production of mushrooms plays a significant role in the Nation's economy. . . .;

(3) mushroom production benefits the environment by efficiently using agricultural byproducts;

(4) mushrooms must be high quality, readily available, handled properly, and marketed efficiently to ensure that the benefits of this important product are available to the people of the United States;

(5) the maintenance and expansion of existing markets and uses, and the development of new markets and uses, for mushrooms are vital to the welfare of producers and those concerned with marketing and using mushrooms, as well as to the agricultural economy of the Nation;

(6) the cooperative development, financing, and implementation of a coordinated program of mushroom promotion, research, and consumer infor-

> mation are necessary to maintain and expand existing markets for mushrooms; and
>
> (7) mushrooms move in interstate and foreign commerce, and mushrooms that do not move in such channels of commerce directly burden or affect interstate commerce in mushrooms.

7 U.S.C. § 6101(a). Based on these findings, Congress stated:

> It is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided in this chapter, of an orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and coordinated program of promotion, research, and consumer and industry information designed to—
>
> (1) strengthen the mushroom industry's position in the marketplace;
>
> (2) maintain and expand existing markets and uses for mushrooms; and
>
> (3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101(b). The statute directs the Secretary to issue an Order to effectuate this goal of establishing an industry-wide program of mushroom promotion, research, and consumer and industry information. 7 U.S.C. § 6103(a).

The Order issued by the Secretary under the MPRCIA provides for the establishment of a Mushroom Council made up of mushroom producers nominated by producers and importers and appointed by the Secretary. The primary function of the Mushroom Council is to administer and carry out the terms of the Order. 7 U.S.C. § 6104(b), (c)(1); 7 C.F.R. §§ 1209.30-1209.40. The activities of the Council, including generic advertising efforts, are funded through mandatory assessments on mushrooms produced in or imported into the United States for the domestic, fresh market. The assessments are to be collected by all first handlers of mushrooms and remitted to the Council, and are not to exceed a penny per pound. 7 U.S.C. § 6104(g); 7 C.F.R. § 1209.51. The Order also requires first handlers to submit monthly reports to the Council containing specified information, including the quantity of mushrooms subject to assessment, and the amount of assessments remitted. 7 U.S.C. § 6104(i); 7 C.F.R. §§ 1209.60-1209.62, 1209.260.

During the 60-day period prior to the effective date of the Order, the Secretary is required to "conduct a referendum among mushroom producers and importers to ascertain whether the Order shall go into effect." 7 U.S.C. § 6105(a)(1). The Order will become effective if "the order has been approved by a majority of the producers and importers voting . . . which majority, on average, annually produces and imports into the United States more than 50 percent of the mushrooms annually produced and imported by all those voting in the referendum." 7 U.S.C. § 6105(a)(2). After the Order becomes effective, the Secretary must conduct additional referendums, at certain specified intervals, to determine if the mushroom producers and importers favor

continuation, termination, or suspension of the Order. 7 U.S.C. § 6105(b)(1)(A); 7 C.F.R. §§ 1209.300-1209.307. A representative group of at least 30% of the mushroom producers and importers may request such a referendum at any time. 7 U.S.C. § 6105(b)(1)(B). The most recent referendum under the Order was conducted from February 24-March 13, 1998, with continuation favored by 80% of those who voted, representing 70% of the volume of mushrooms produced by those who voted.

These cases arise out of United Foods' refusal to pay the assessments or submit the monthly reports required by the MPRCIA and the Order. United Foods challenges the constitutionality of the statute and the Order under the First Amendment, arguing that the mandatory assessments are used to support speech with which it does not agree. United Foods also argues that the statute and Order violate the Equal Protection Clause of the Fifth Amendment because certain classes of mushroom producers are exempt from the assessment and reporting requirements.

In *Wileman Bros.*, the Supreme Court considered a First Amendment challenge to marketing orders issued pursuant to the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. § 601 *et seq.* A group of growers, handlers, and processors of California nectarines, plums, and peaches asserted that the imposition of mandatory assessments used to fund generic advertising of those fruits violated the First Amendment by compelling them to finance others' speech. The Supreme Court, however, held that being compelled to fund such generic advertising does not implicate the First Amendment. Rather, the program was "a species

of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress." 117 S. Ct. at 2142.

The Court in *Wileman Bros.* emphasized that:

> Three characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge the freedom of speech protected by the First Amendment. First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views.

117 S. Ct. at 2138. The Court noted that these three characteristics served to differentiate the program from the various laws and schemes at issue in, for example, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) (commercial speech), *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (compelling actual speech by a particular person), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)(compelling financial contributions for political purposes with which one does not agree). 117 S. Ct. at 2138 nn.12-14. The Court then stated, "none of our First Amendment jurisprudence provides any support for the suggestion that the promotional regulations should be scrutinized under a different standard than that applicable to the other anticompetitive features of the marketing orders." *Id.* at 2138.

The Court recognized that the generic advertising involved in *Wileman Bros.* was intended to stimulate consumer demand for California peaches, plums, and nectarines, and that this "purpose is legitimate and consistent with the regulatory goals of the overall statutory scheme." *Id.* at 2141. The mere fact that such generic advertising may not be the most effective method of promotion, or that those objecting "believe their money is not being well spent" does not implicate the First Amendment. *Id.* at 2140. The Court concluded by stating, "[t]he mere fact that one or more producers 'do not wish to foster' generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial." *Id.* at 2142.

United Foods states that *Wileman Bros.* involved the AMAA, a "detailed regulatory scheme that restricts competition," while the MPRCIA is "free-standing" legislation that exists *only* to collect assessments to be used for promotion, advertising, and research. Therefore, it is argued, this case is distinguishable, and *Wileman Bros.* is not controlling. However, like other courts which have addressed whether *Wileman Bros.* is applicable to "free-standing" legislation, this court finds United Foods' arguments unpersuasive. *See Goetz v. Glickman*, __ F.3d __, 1998 WL 384618 (10th Cir. July 10, 1998); *Donald B. Mills, Inc. v. United States Dept. of Agric.*, No. CV-F-97-5890 OWW SMS (E.D. Cal. Mar 5, 1998) (rejecting the identical arguments regarding the MPRCIA raised in this case); *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, No. S-96-102 EJG/GGH (E.D. Cal. Aug. 6, 1997).

There is nothing in *Wileman Bros.* that supports United Foods' assertion that the decision applies only to those statutory and regulatory programs that contain detailed restrictions on competition in a particular agricultural market. As succinctly stated by Judge Garcia in his ruling in *Matsui Nursery*:

> The *Wileman* decision did not turn on the degree to which State or Federal Government has otherwise displaced free market competition. Rather, the Court found that compelled participation in a generic advertising program is itself a form of economic regulation whose efficacy is to be judged by legislatures, Government officials and producers, and not by the Court. . . .

No. S-96-102 EJG/GGH, slip op., tr. at 12-13.

Wileman Bros. is clearly dispositive of United Foods' First Amendment challenge to the MPRCIA and the Order, and the United States is entitled to summary judgment on that claim.

The court finds that United Foods' challenge to the MPRCIA and the Order on equal protection grounds is also without merit. United Foods objects because the MPRCIA exempts from the payment of assessments three categories of mushrooms or producers: (1) producers who produce or import, on average, less than 500,000 pounds of mushrooms annually for the fresh mushroom market; (2) mushrooms that are exported; and (3) mushrooms that are sold to be processed rather than for the fresh market. 7 U.S.C. §§ 6102(6), (9), & (11); 6104(g)(1)(A)-(B) & (g)(4).

The Supreme Court's equal protection analysis is well established. United Foods, as a mushroom producer, is not a member of a "suspect" or "quasi-suspect" class, and the exercise of "fundamental rights" is not inordinately burdened. Therefore, it is unnecessary to apply either the "strict scrutiny" or "intermediate scrutiny" standard. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985). *See also 37712, Inc. v. Ohio Dept. of Liquor Control*, 113 F.3d 614, 621 (6th Cir. 1997).

The challenged provisions is this case are appropriately analyzed using the least demanding standard, the "rational relationship" test. Under this test, the legislation bears a strong presumption of validity and will be sustained if the legislative classification is rationally related to any conceivable legitimate governmental interest. *Heller v. Doe by Doe*, 509 U.S. 312, 319-21 (1993); *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993); *City of Cleburne*, 473 U.S. at 439-40; *Equality Foundation v. City of Cincinnati*, 128 F.3d 289, 293 (6th Cir. 1997); *37712, Inc.*, 113 F.3d at 621-22. Furthermore, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications*, 508 U.S. at 315.

As set out earlier in this order, Congress specifically found that mushroom production plays a significant role in the national economy and benefits the environment. Congress also found that the "cooperative development, financing and implementation" of a program of mushroom promotion, research, and consumer information was necessary to maintain and expand existing markets, and to develop new markets, for fresh mushrooms.

7 U.S.C. § 6102(a). These findings clearly constitute a legitimate governmental interest.

The exemptions set out in the MPRCIA plainly bear a rational relationship to the specified governmental interest. It is reasonable that, given the small percentage of mushrooms produced for export compared to the percentage produced for the domestic market, Congress would choose to concentrate promotional programs solely on the domestic market. In addition, most mushrooms produced in the United States are sold in the fresh market. Fresh mushrooms, unlike processed mushrooms, have a short shelf life and bring a substantially higher price per pound. Thus, the markets for fresh and processed mushrooms are somewhat distinct, and it is not unreasonable to treat them differently. Finally, it was not unreasonable for Congress to conclude that, compared to those producing over 500,000 pounds of mushrooms annually, assessments from small volume producers would likely be offset by the administrative costs incurred in collecting such small amounts.

It is clear that the challenged distinctions set out in the MPRCIA and the Order easily satisfy the rational relationship test, and do not violate the equal protection clause. Thus, the United States is also entitled to summary judgment on United Foods' Fifth Amendment claim.

For the foregoing reasons, the United States' motions for summary judgment in these consolidated cases are hereby GRANTED. Judgment will be entered accordingly.

IT IS SO ORDERED.

/s/ JAMES D. TODD
JAMES D. TODD
UNITED STATES DISTRICT
JUDGE

Date: July 27, 1998

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-6436

UNITED FOODS, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF
AGRICULTURE, DEFENDANTS-APPELLEES

[Filed: Mar. 23, 2000]

ORDER

Before: MERRITT and CLAY, Circuit Judges; and ALDRICH,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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* Hon. Ann Aldrich, Senior United States District Judge for the Northern District of Ohio, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN
Clerk

APPENDIX D

STATUTORY PROVISIONS INVOLVED

1. Section 6101 of Title 7 of the United States Code provides:

Findings and declaration of policy

(a) Findings

Congress finds that—

(1) mushrooms are an important food that is a valuable part of the human diet;

(2) the production of mushrooms plays a significant role in the Nation's economy in that mushrooms are produced by hundreds of mushroom producers, distributed through thousands of wholesale and retail outlets, and consumed by millions of people throughout the United States and foreign countries;

(3) mushroom production benefits the environment by efficiently using agricultural byproducts;

(4) mushrooms must be high quality, readily available, handled properly, and marketed efficiently to ensure that the benefits of this important product are available to the people of the United States;

(5) the maintenance and expansion of existing markets and uses, and the development of new markets and uses, for mushrooms are vital to the welfare of producers and those concerned with

marketing and using mushrooms, as well as to the agricultural economy of the Nation;

(6) the cooperative development, financing, and implementation of a coordinated program of mushroom promotion, research, and consumer information are necessary to maintain and expand existing markets for mushrooms; and

(7) mushrooms move in interstate and foreign commerce, and mushrooms that do not move in such channels of commerce directly burden or affect interstate commerce in mushrooms.

(b) Policy

It is declared to be the policy of Congress that it is in the public interest to authorize the establishment * * * of an orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and coordinated program of promotion, research, and consumer and industry information designed to–

(1) strengthen the mushroom industry's position in the marketplace;

(2) maintain and expand existing markets and uses for mushrooms; and

(3) develop new markets and uses for mushrooms.

(c) Construction

Nothing in this chapter may be construed to provide for the control of production or otherwise limit the right of individual producers to produce mushrooms.

2. Section 6103 of Title 7 of the United States Code provides, in pertinent part:

Issuance of orders

(a) In general

To effectuate the declared policy of section 6101(b) of this title, the Secretary * * * shall issue orders under this chapter applicable to producers, importers, and first handlers of mushrooms. Any such order shall be national in scope. Not more than one order shall be in effect under this chapter at any one time.

* * * * *

3. Section 6104 of Title 7 of the United States Code provides, in pertinent part:

Required terms in orders

(a) In general

Each order issued under this chapter shall contain the terms and conditions prescribed in this section.

(b) Mushroom Council

(1) Establishment and membership of Council

(A) Establishment

The order shall provide for the establishment of, and selection of members to, a Mushroom

Council that shall consist of at least 4 members and not more than 9 members.

* * * * *

(c) Powers and duties of Council

The order shall define the powers and duties of the Council, which shall include the following powers and duties—

* * * * *

(4) to propose, receive, evaluate, approve and submit to the Secretary for approval * * * budgets, plans, and projects of mushroom promotion, research, consumer information, and industry information, as well as to contract and enter into agreements with appropriate persons to implement such plans or projects;

(5) to develop and propose to the Secretary voluntary quality and grade standards for mushrooms;

* * * * *

(g) Assessments

(1) Collection and payment

(A) In general

The order shall provide that each first handler of mushrooms for the domestic fresh market produced in the United States shall collect, in the manner prescribed in the order, assessments from producers and remit the assessments to the Council.

(B) Importers

The order also shall provide that each importer of mushrooms for the domestic fresh market shall pay assessments to the Council in the manner precribed by the order.

* * * * *

(3) Use of assessments

The order shall provide that the assessments shall be used for payment of the expenses in implementing and administering this chapter, with provision for a reasonable reserve * * *.

* * * * *

(h) Prohibition

The order shall prohibit any funds received by the Council under the order from being used in any manner for the purpose of influencing legislation or governmental action or policy, except that such funds may be used by the Council for the development and recommendation to the Secretary of amendments to the order as prescribed in this chapter and for the submission to the Secretary of recommended voluntary grade and quality standards for mushrooms under the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 et seq.).

Supreme Court, U.S.
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(2)

No. 00-276

IN THE

Supreme Court of the United States

United States of America and
United States Department of Agriculture,

Petitioners,

v.

United Foods, Inc.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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October 18, 2000

34 pp

RULE 29.6 STATEMENT

Pictsweet, L.L.C. is the parent corporation of Respondent United Foods, Inc. No other company owns 10% or more of Respondent's stock.

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RESPONDENT'S BRIEF IN OPPOSITION

The Sixth Circuit in this case resolved an exceedingly narrow question limited to only part of a government program that itself applies to a single, unique industry: may the government by regulation exact a financial assessment from mushroom producers and importers to be used for generic advertising of mushrooms? The Sixth Circuit's holding that the assessment is invalid because it is not germane to any government effort at regulating the stable and free market for mushrooms follows directly from this Court's recent decision in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). No other court (whether state or federal, trial or appellate) has even *considered* the same question, much less reached a contrary holding. Nor does the decision below invalidate an Act of Congress. This case furthermore would be an exceedingly poor vehicle to resolve any broader issues regarding the constitutionality of compelled advertising programs because there is no substantial factual record in this case that would permit a full exploration of the nature of the markets for mushrooms and other commodities that are subject to similar advertising assessments. Certiorari accordingly should be denied.

1. Respondent United Foods grows and sells mushrooms. Headquartered in Tennessee, United Foods operates mushroom farms in Ventura, California (serving Southern California and Arizona); Salem, Oregon (serving the Pacific Northwest); and Fillmore, Utah (serving the Central Rocky Mountain States). The farms supply only local geographic markets because the low density of mushrooms makes shipping costly and because mushrooms spoil relatively soon after harvesting and are easily bruised in transit.

United Foods' marketing strategy is to differentiate its mushrooms and its service to retailers as superior to that provided by its competition. Because United Foods competes with only a small number of suppliers in each self-contained

local market, its marketing efforts are local, rather than national. In its local markets, United Foods promotes its "Pictsweet" brand name and expends considerable amounts of money, generally in coordination with retailers, to encourage purchasing of United Foods mushrooms as opposed to other brands. For example, with certain specific grocers, United Foods assists in shelf-space planning, subsidizes newspaper advertising, provides point-of-sale promotions, and conducts in-store demonstrations and tastings. It is essential that marketing efforts be targeted in this fashion because mushrooms are perceived by the public as a discretionary, gourmet item and therefore are attractive only to certain consumers.

The mushroom industry is characterized by vigorous competition, extraordinary stability, and elasticity of supply. *E.g.*, Jim Offner, *Mushrooms: Record Year Raïses Hopes For Future*, THE PACKER, Sept. 11, 2000, at A2 (reporting view of the President of the Mushroom Council that the market is typified by "a stable price, with increasing supplies"). Mushroom farms are unique facilities, entirely insulated from the weather in warehouse-like buildings, in which factors such as temperature, humidity, and carbon dioxide levels are closely controlled within "growing rooms" to maintain optimal conditions during the sixty- to ninety-day growing cycle. See U.S. Dep't of Agric., *An Economic Assessment of Mushrooms: Executive Summary* (undated) <<*www.act.fcic.usda.gov/pilots/feasible/txt/mushroom.txt*>> (visited Oct. 5, 2000) ("[V]irtually all commercial mushroom production occurs indoors, where it is largely isolated from naturally-occurring perils, such as unseasonable cold, moisture extremes, wind storms, and hail, which cause most yield losses among outdoor crops."). Thus, mushroom producers such as United Foods produce mushrooms 365 days per year and, at any given time, will have mushrooms at every stage of production. Because of the exceedingly short growing cycle for mushrooms and the flexibility afforded by the numerous growing rooms, mushroom growers can, with insignificant

marginal investment, quickly increase or decrease production in response to changing local market conditions.[1]

2. Given the absence of competitive barriers and the consistent stability of the market, the federal government has elected not to regulate the mushroom industry. Federal law does not regulate quality, packaging, advertising, pricing, or volume. Nor does the government have any programs to modulate demand or supply, whether by purchasing oversupply or otherwise.

Federal regulation instead touches upon mushrooms in only one way: the "Mushroom Order," only part of which is at issue in this case. Congress enacted the Mushroom Promotion, Research, and Consumer Information Act ("Mushroom Act") in 1990. Pub. L. No. 101-624, §§ 1921-1933 (Food, Agriculture, Conservation, and Trade Act of 1990, tit. XIX, subtit. B, 104 Stat. 3854-3865), *codified at* 7 U.S.C. §§ 6101-6112. In sum, the Act directs the Secretary of Agriculture to issue an Order providing for the formation of a "Mushroom Council" that will direct programs for "mushroom promotion, research, consumer information, and industry information." 7 U.S.C. § 6104(b); *id.* § 6104(c)(4). The Secretary promulgated the Order in 1993. See 7 C.F.R. Pt. 1209. Neither the Mushroom Act nor the Order was involved in *Wileman*.

---

[1]At two of United Foods' farms – in Ventura, California and Salem, Oregon – the facilities are divided into 90 growing rooms, each of which contains between 8000 and 10,000 square feet of mushroom "beds." Conditions within each growing room are adjusted as necessary to approximate optimal conditions as each room's crop of mushrooms progresses through the growing cycle. At United Foods' third farm, in Fillmore, Utah, conditions in each growing room are maintained at a constant level approximating optimal conditions for one particular stage of the growing cycle; mushrooms are then shifted from room to room in moveable trays as they progress through the cycle.

This case involves only the Council's method for funding its promotion and information programs, which involve such activities as advertising and public relations directed at the grocery trade and consumers. See 7 C.F.R. § 1209.17. The Mushroom Order provides that funding for the Council's programs and administrative costs – including the promotion of consumption of mushrooms – may be secured through a mandatory assessment on domestic production and importation of mushrooms. *Id.* § 1209.51. The assessment applies, however, only to producers and importers of more than 500,000 pounds of mushrooms annually for the "fresh" market. 7 U.S.C. § 6102(9), 7 C.F.R. §§ 1209.11, 1209.52. Funding also can be secured by voluntary contributions. 7 C.F.R. § 1209.50(d).

3. As a constitutional matter, United Foods opposes the Council's generic, nationwide approach to promoting mushrooms. The Council's "if you've seen one mushroom, you've seen them all" promotions undermine United Foods' effort to differentiate its Pictsweet brand from competitors, as well as its effort to tailor marketing to local retail conditions. United Foods' private ownership also objects to the Council's promotions, including efforts to associate mushrooms with consumption of alcohol and its decision to tout mushrooms as an aphrodisiac.

Furthermore, United Foods regards the Council's budget (on the order of one million dollars for promotions throughout the whole country, C.A. App. 311) as a waste of money: it is too small to increase mushroom consumption (particularly given that the industry is highly competitive and already contains substantial private advertising). The Council's nationwide generic advertising also fails to account for local conditions and the specific consumers likely to purchase mushrooms. Not surprisingly, the Council's advertising has produced no demonstrated effect on the marketplace. See Decision on Respondent's Motion for Reconsideration, *In re Donald B. Mills, Inc.*, MPRCIA Dkt. No. 95-1 (June 12,

1996), at 7-8 ("Because the evidence has not shown that the Mushroom Council was better able to promote and increase consumption of mushrooms than [private] producer-handlers, or to increase consumption at all, the Mushroom Promotion Council's program has not been shown to directly advance the government's interest in stimulating and expanding the mushroom industry."). Furthermore, because mushroom producers can easily increase or decrease production over the short term in response to changes in the market, a generic promotion program *cannot* increase mushroom prices by increasing mushroom demand; to the extent that any such program actually increased demand, producers, including particularly those not currently in the market for fresh mushrooms, could (and would) simply (and quickly) increase production.

United Foods therefore filed a petition with the Secretary of Agriculture, see 7 U.S.C. § 6106(a), seeking a determination that the Order's assessment to pay for mushroom promotions violates the First Amendment. The United States in turn filed suit in federal district court in Tennessee, see *id.* § 6107(a), seeking to compel United Foods to pay the assessment. Based on the government's objection, the administrative law judge rejected United Foods' request to have a developed record from a parallel administrative challenge to the mushroom assessment adopted in this case. Order Granting Motion To Stay Proceedings, No. 96-1252, *United States* v. *United Foods*, at 4 (W.D. Tenn. Feb. 11, 1997) ("Upon the filing of United Foods' administrative petition raising the same issues [as another administrative proceeding], the ALJ proposed that the parties agree to rely on the record in the Mills hearing. The Secretary objected, however, and requested a new hearing."). Without holding a hearing, the administrative law judge and a judicial officer of the Department of Agriculture subsequently rejected United Foods' claim, and Respondent sought review in the same district court. See 7 U.S.C. § 6106(b)(1).

The district court consolidated both actions and granted the government's motion for summary judgment. Pet. App. 20a. The court concluded that the Order's assessment for paid promotions was valid under this Court's decision in *Wileman*, which narrowly sustained marketing orders applicable to California tree fruits. Rejecting United Foods' argument that the mushroom assessment was unconstitutional under *Wileman* because the mushroom industry is entirely unregulated, the district court concluded that "[t]he *Wileman* decision did not turn on the degree to which [the] State or Federal Government has otherwise displaced free market competition." Pet. App. 18a (citation omitted).

4. On United Foods' appeal, the Sixth Circuit reversed. The court of appeals characterized the question before it as "whether the government is right that [the degree of regulation] is irrelevant under *Wileman*." Pet. App. 4a; see also *id.* 3a (describing the government's position that "the degree of regulation or 'collectivization' of an industry should make no First Amendment difference"). Devoting nearly the whole of its opinion to an analysis of *Wileman*, the Sixth Circuit "conclude[d] that the explanation for the *Wileman* decision is to be found in the fact that the California tree fruit industry is fully collectivized and is no longer a part of a free market, as well as in the nonpolitical nature of the compelled speech." *Id.* 7a. In particular,

> In the *Wileman* case, the Supreme Court emphasized and reemphasized that the compelled advertising program for California tree fruits under the Agricultural Marketing Agreement Act of 1937 contemplates "a uniform price to all producers in a particular market," a "policy of collective, rather than competitive, marketing" and an exemption from the antitrust laws in order "to avoid unreasonable fluctuation in supplies and prices." *Wileman*, 521 U.S. at 461, 117 S. Ct. 2130. In his opinion for five members of the Court, Justice Stevens repeatedly "stress[ed] the importance" of the fact

> that the advertising takes place "as a part of a broader collective enterprise in which [the producers'] freedom to act independently is already constrained by the regulatory scheme." *Id.* at 469, 117 S. Ct. 2130.

Pet. App. 4a-5a.

In this respect, the Sixth Circuit reasoned, compelled promotion programs are sustainable if they are part and parcel of a broader scheme of government regulation. "The purpose of this principle joining regulation and content is to deter free riders who take advantage of their monopoly power resulting from regulation of price and supply without paying for whatever commercial benefits such free riders receive at the hands of the government." Pet. App. 7a-8a. In other words, "If an economic actor chooses to remain aloof from the regulated industry, he owes no reciprocal duty to promote the industry; but if he chooses to join, he has a reciprocal duty to promote its interest." *Id.* 8a. The court of appeals therefore concluded that *Wileman* insulates from First Amendment challenge compelled promotion schemes that are "'germane to the purposes'" of market regulation, *id.* 6a (quoting *Wileman*, 521 U.S. at 473), or that present "some other compelling justification," *id.* 7a.

Applying that analysis, the Sixth Circuit found that the mushroom assessment failed to pass muster under *Wileman* because "the mushroom business is entirely different from the collectivized California tree fruit business. Mushrooms are unregulated." Pet. App. 8a. "[T]he mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply." *Id.* 5a. Indeed, "[t]he Act *does not permit* the regulation of prices or mandatory quantity or quality controls of mushrooms produced and sold by farmers, nor does it subsidize or restrict the growth of mushrooms or otherwise collectivize the industry." *Id.* 2a n.1 (citing 7 C.F.R. § 1209.40(a) ("[N]othing in this subpart [*i.e.*, the Mushroom Order] may be construed to authorize mandatory

requirements for quality control, grade standards, supply management programs, or other programs that would control production or otherwise limit the right of individual producers to produce mushrooms.")).

ARGUMENT

None of the four bases asserted by Petitioner for granting certiorari is persuasive. The Sixth Circuit's holding is entirely faithful to, and indeed is compelled by, this Court's decision in *Wileman*. No other court of appeals has reached a contrary result. Indeed, no other court has ever considered the question presented by this case; the decisions invoked by Petitioner involve not mushrooms but instead the beef industry, which is easily distinguishable on several independent grounds. Nor does the decision below interfere with the orderly administration of other government assessment and advertising programs. Finally, review is unwarranted because the part of the Mushroom Order invalidated by the Sixth Circuit is terminable at will either by the Secretary of Agriculture or by participants in the market. The Sixth Circuit thus did not invalidate an Act of Congress, but only an administrative order of temporary (and potentially quite limited) duration. Certiorari therefore should be denied.

I. The Ruling Below Does Not Conflict With This Court's Decision In *Wileman*.

1. Relying on this Court's decision in *Wileman*, the Sixth Circuit correctly rejected Petitioner's claim that the degree of regulation is "irrelevant" and "make[s] no First Amendment difference" in evaluating a program of compelled commodity promotion. Pet. App. 3a-4a. Petitioner now maintains that *Wileman* "did not * * * center on the extent to which those industries were regulated," because the Court's discussion of the degree of regulation "was in Part III of the Court's opinion" while "[t]he Court's First Amendment analysis, on the other hand, was set forth in Part IV of the Court's opinion." Pet. 10. That is not correct. The majority opinion in *Wileman*

repeatedly emphasized the comprehensive nature of regulations governing the tree fruit industry and marketplace. See 521 U.S. at 461 (opinion Part I; describing "the policy of collective * * * marketing"); *id.* at 474 (opinion Part IV; noting that some tree fruit producers "may well object to the marketing orders * * * because they might earn more money in an unregulated market"); *id.* at 474 (opinion Part IV; noting "other features of the regulatory orders that impose restraints on competition that arguably disadvantage particular producers for the benefit of the entire market"); *id.* (opinion Part V; noting "the collective action program at issue here"); *id.* at 475 (opinion Part V; "The basic policy decision that underlies the entire statute rests on an assumption that in the volatile markets for agricultural commodities the public will be best served by compelling cooperation among producers in making economic decisions that would be made independently in a free market."); *id.* at 476 (opinion Part V; "Generic advertising is intended to stimulate consumer demand for an agricultural product in a regulated market. That purpose is legitimate and consistent with the regulatory goals of the overall statutory scheme.").

Most telling is the *Wileman* majority's introduction to its First Amendment analysis, which is so clear that no degree of parsing by Petitioner can draw significance from the fact that it appears immediately before rather than immediately after heading "IV" in the opinion:

> *The legal question that we address* is whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve.
>
> *In answering this question we stress* the importance of the statutory context in which it arises. California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize

> other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme. *It is in this context* that we consider whether we should review the assessments used to fund collective advertising, together with other collective activities, under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment issues.

521 U.S. at 469 (emphases added). Petitioner back-handedly admits that, "[t]o be sure, the Court did 'stress the importance'" of the regulatory context of the tree fruit programs, Pet. 10 (quoting 521 U.S. at 469), but then totally fails to explain why, on its reading of *Wileman*, the majority *did* "stress" the issue.[2]

Not only is Petitioner's position irreconcilable with *Wileman*, but it would also go far beyond any of this Court's compelled speech precedents and permit the government to compel private parties to finance *any* commercial message of the government's choosing. The only limit acknowledged by Petitioner is that the assessment must be germane to a promotion

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[2] Thus petitioner is flatly wrong in stating that "[p]resumably, if the Court had intended its decision in *Wileman Brothers* to turn on the extent of regulation of the industry at issue, the Court would not merely have stated as a fact that the California tree fruit industry was extensively regulated, but would also have explained the significance of such a fact to its First Amendment analysis." Pet. 10. It is difficult to understand what more Petitioner would require than this Court's precise statement of "[t]he legal question we address" followed immediately by the admonition that "[i]n answering this question we stress the importance" of the regulated nature of the tree fruit industry.

program. But that of course is no limit at all because it is completely tautological: it is the *assessment* that funds the very promotion program to which it is said to be germane. Nothing short of the Sixth Circuit's understanding that compelled advertising is constitutional only when germane to a broader regulatory program in order to prevent free riding by market participants makes sense of this Court's decision in *Wileman* and prevents a gross expansion of the government's ability to compel private speech. See Pet. App. 7a-8a.

2. Petitioner offers the further theory, which can only be described as convoluted in the extreme, that *Wileman* cannot rest on the regulated nature of commodity markets because the Court in that case granted certiorari to resolve a conflict between the Ninth Circuit's decision invalidating the tree fruit program and the Third Circuit's decision in *United States* v. *Frame*, 885 F.2d 1119 (1989), *cert. denied*, 493 U.S. 1094 (1990), sustaining a program for beef. Pet. 10-11. Asserting that the beef market is not regulated, Petitioner contends that the Court could not have relied on regulation in the tree fruit industry because "the circuit conflict that the Court identified * * * would not have been resolved." Pet. 11.

Petitioner's argument is a *non sequitur*: the Court not infrequently grants certiorari to resolve a circuit conflict but ultimately rules on some other basis. In particular, it was Petitioner itself that repeatedly argued in *Wileman* that the tree fruit advertising programs should be sustained on the ground that they furthered the government's efforts to stabilize the market through regulation. Petitioner explained that the "programs [were] undeniably 'germane' to the statutory purposes of establishing stable agricultural market conditions and expanding the market for the covered commodities by increasing consumption of those commodities," Br. for United States, No. 95-1184 (hereinafter "Petr's *Wileman* Opening Br.") 15, and specifically "were intended to address the devastating effects of depressed consumption and unstable market forces that prevailed at the time of their enactment,"

id. 26. See also *id.* 16 (first sentence of argument section explaining that tree fruit marketing orders were designed, *inter alia*, "to stabilize the market for California nectarines, peaches and plums"). Describing as "incorrect" the plaintiffs' position that the tree fruit program was nothing more than compelled speech, Petitioner in its reply brief aptly summarized its position as follows:

> The regulatory framework established by the Act and the Secretary's marketing orders has the nonspeech-related purpose of establishing stable and orderly marketing conditions and enhancing returns to growers. See Gov't Br. 3, 26, 35. The Act and its enabling regulations establish *an array of mechanisms* designed to achieve that end, including minimum quality and maturity standards, grading and inspection requirements, production research, marketing research, and development projects. 7 U.S.C. 602(3). The generic advertising activities that are at issue here are *but one element* of the 'marketing research and development projects' authorized by Congress, 7 U.S.C. 608c(6)(I), and are part of a *far broader regulatory system* that does not principally concern speech.

Reply Br. of the U.S., No. 95-1184, at 3-4 (emphases added); see also *id.* 4-5 (tree fruit advertising "is part of a larger regulatory framework that does not principally concern speech").

Petitioner went still further at oral argument, conceding that, were it not for the interest in "regulating these commodities and establishing orderly market conditions," "then the Government *would lose in this case*." Oral Arg. Trans., No. 95-1184 (hereinafter "*Wileman* Arg. Trans.") 13 (emphasis added); see also *id.* 6 ("The Agricultural Marketing Agreement Act expressly sets out the goals of that statute and of the marketing orders, which include establishing orderly market conditions for the covered commodities."); *id.* 7 (agreeing, in response to question from Justice Souter, that

failure to impose assessment *even on tree fruits* in other areas of the country was explicable because "there simply has not been a demonstrated instability in markets elsewhere"). Moreover, Petitioner addressed the beef program and the Third Circuit's *Frame* decision in precisely those terms. When Justice Ginsburg raised *Frame* at oral argument, Petitioner described the unstable state of the beef and tree fruit markets as "quite similar" but the regulatory programs as "somewhat different" because "[t]he beef program focuses almost exclusively on promotional programs and advertising." *Wileman* Arg. Trans. 26.

Because the Sixth Circuit correctly recognized that *Wileman* turned on the regulated nature of the tree fruit industry, there is no occasion for certiorari review.

II. The Ruling Below Does Not Conflict With Any Decision Of Another Circuit.

Petitioner's argument that the Sixth Circuit's decision invalidating the mandatory assessment for generic mushroom promotion creates a circuit conflict is strained indeed, given that no other federal or state court has *ever* even considered the constitutionality of that program. Petitioner instead must rely on a severe overreading of the breadth of the decision below. The Sixth Circuit's decision is limited by its plain terms, leaving open the question whether other commodity promotion programs would be sustained under the First Amendment. The court in this case went no further than to reject Petitioner's argument that the degree of regulation is "irrelevant" and "make[s] no First Amendment difference." Pet. App. 3a-4a. Indeed, the Sixth Circuit expressly concluded that alternative programs would be sustained if they presented "some other compelling justification not present in the case before us." *Id.* 7a. It was only because mushrooms are entirely unregulated that the Court concluded that the

promotion assessment in this case was not germane to any broader effort to stabilize the market. *Id.* 7a-9a.[3]

Petitioner's only stab at asserting a circuit conflict – its argument that the decision below conflicts with two decisions sustaining the assessment for beef, see 7 U.S.C. §§ 2901-11 – misses the mark for several reasons. First, assuming for the moment that the beef and mushroom programs are analogous and both industries are unregulated, no conflict exists because neither case cited by Petitioner addresses the question of what result *Wileman* compels for unregulated commodities. The Third Circuit's decision in *Frame*, in fact, is entirely irrelevant because it predates *Wileman*. Petitioner's description of the other case, *Goetz* v. *Glickman*, 149 F.3d 1131 (CA10 1998), *cert. denied*, 525 U.S. 1102 (1999), is not correct. Petitioner quotes a single sentence in the *Goetz* plaintiff's brief and then quotes the Third Circuit's decision that the plaintiff's "'First Amendment claim is fruitless.'" Pet. 11-12 (quoting 149 F.3d at 1139). In reality, the Third Circuit in *Goetz* addressed only a distinct First Amendment claim, as the opinion makes clear when read in context: "First Amendment. Goetz also asserts the assessment violates his First Amendment right because he is compelled to support advertising which promotes beef consumption. Goetz argues the Act singles out and unfairly burdens producers, importers and persons who must collect the tax (buyers of beef)." 149 F.3d at 1138. The Tenth Circuit's summary rejection of the plaintiffs' claim that the beef assessment "singles out and unfairly burdens" certain market participants is distinguishable from

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[3] Of note, the Sixth Circuit has by unpublished opinion sustained the assessment for milk, reasoning that *Wileman* insulates from constitutional challenges promotion programs for industries subject to government regulation, even if they "may not be as regulated as the produce industry at issue in [*Wileman*]." *Nature's Dairy* v. *Glickman*, No. 98-1073, 1999 U.S. App. LEXIS 3547, at *10 (Mar. 2, 1999), *cert. denied*, 120 S. Ct. 786 (2000).

and, indeed, is unrelated to the Sixth Circuit's holding in this case.

Second, the *Frame* and *Goetz* decisions are distinguishable because the market for beef is less stable and (in part for that reason) more heavily regulated than the market for mushrooms. The Third Circuit explained in *Frame* that the assessment for beef rests on the government's interest in

> preventing further decay of an already deteriorating beef industry. * * * Widespread losses and severe drops in the value of inventory have driven many cattlemen to bankruptcy, as well as to the abandonment of ranching altogether. A continuation of this trend would endanger not only the country's meat supply, but the entire economy.

885 F.2d at 1134 (citing Committee Report, Beef Research and Information Act, H.R. Rep. No. 452, 94th Cong., 1st Sess. 2-3 (1975); 121 Cong. Rec. H31439 (1975) (remarks of Rep. Santini); H.R. Rep. No. 271, 99th Cong., 1st Sess. 2 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1111); see also Bill Hord, *USDA May Spur Cattle Price Hike*, OMAHA WORLD-HERALD, Mar. 25, 1998, at 1 (quoting Sen. Tom Harkin, who described "serious economic hardships threatening the survival of livestock producers").

Among other things, the market for beef is significantly less stable and elastic than the mushroom market because beef production involves substantially longer growth cycles. Beef cattle, which are generally slaughtered between fifteen months and two years after birth, are raised in herds, which can only be expanded at a limited rate per year. See Terence P. Stewart et al., *Trade and Cattle: How the System Is Failing An Industry in Crisis*, 9 MINN. J. GLOBAL TRADE 449, 460 (2000) ("The cattle cycle reflects the limited ability of cattle producers to respond to changes in market conditions because of the time required to raise the cattle until they are ready for sale to the packing houses. * * * [C]ow-calf operators expand

or liquidate their herds based on the market conditions they believe will prevail in two or three years."). For beef producers, profitability is a function of total supply and grain prices and cannot be modified in the short term. Thus, in contrast to the mushroom market, generic promotion campaigns may be more effective for the beef industry (and the tree fruit industry at issue in *Wileman*) because of the length of its growing cycles and its inability to respond to short-term changes in the market; to the extent that such campaigns increase beef consumption, prices will rise as a result of demand-pull inflation because the supply of beef is relatively fixed in the short term.[4]

The federal government specifically has adopted a number of market stabilization measures for the beef market that

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[4] Both the beef and tree fruit industries are uniquely susceptible to economic forces that make those markets far less stable than mushrooms. For beef, the principal factor leading to market instability is the zero-sum relationship between fed and breed cattle. When beef is in oversupply and prices are low, it is not economical for ranchers to breed cattle to increase future supplies. Cattle therefore are slaughtered at greater rates, ironically increasing supplies and further suppressing prices. When beef is in undersupply and prices are low, the economic incentive is to use female cattle for breeding, further tightening supplies. It may take a substantial extrinsic shock, such as a change in feed costs or interest rates, to correct the market by sending prices in the opposite direction.

For tree fruit, the principal factors are the long lead time from planting until maturity and the large capital commitment incurred at the time of planting. Growers respond to higher prices by enlarging their orchards. By the time new plantings are at full production (typically seven years), considerably more trees may have been planted than the market can support. In times of substantial oversupply, which are sustained because growers continue producing because most of their costs already have been sunk, prices may fall for considerable periods.

do not exist in the mushroom industry. For example, the Packers and Stockyards Act of 1921, Pub. L. No. 100-173, 101 Stat. 917, *codified at* 7 U.S.C. §§ 181-231, and its accompanying regulations, 9 C.F.R. § 201.1 et seq., were enacted to ensure competitive conditions in the beef market and to prohibit unfair and deceptive practices in the procurement of livestock. *E.g.*, Douglas J. O'Brien, Note, *The Packers & Stockyards Act of 1921 Applied to the Hog Industry of 1995*, 20 IOWA J. CORP. L. 651, 652-53 (1995) ("The Act attempts to assure fair trade practices in the livestock marketing and meat packing industries in order to safeguard farmers against receiving less than true market value for their livestock, and to protect consumers from unfair marketing of meat. When Congress passed the Act, it was described as '*a most comprehensive measure, extending farther than any previous law in the regulation of private business*, in time of peace, except possibly in the Interstate Commerce Act.'" (emphasis added) (citation omitted)). Thus, the Packers and Stockyards regulations prohibit meat packers from owning or operating market agencies, see 9 C.F.R. § 201.67, and limit the extent to which a market agency can enter into agreements or relationships with dealers or other buyers, *id.* § 201.61, or purchase livestock consigned to it, *id.* § 201.56. The regulations also limit the exchange of information (including the prices to be paid and the volume to be purchased) among buyers prior to or during the course of purchases, *id.* § 201.69; require all market agencies and dealers to register with the USDA, *id.* § 201.10; and provide extensive detail regarding the scales used to weigh livestock for sales, including the frequency with which scales are to be tested, *id.* § 201.72, and instructions for weighing livestock, *id.* § 201.73-1.

Congress has further sought to foster competitive market conditions in the beef industry through the passage of the Livestock Mandatory Reporting Act of 1999, Pub. L. No. 106-78, 113 Stat. 1188, *codified at* 7 U.S.C. §§ 1635-1636h, which requires large livestock packers and processors to provide USDA with sales and pricing information, and which is

itself an intervening development that could substantially affect the courts of appeals' analysis of the constitutionality of the beef program. The mandatory reporting requirement, which represents a change from the USDA's earlier voluntary reporting process, was deemed necessary in light of the industry's increased concentration and the prevalence of private marketing arrangements, in which prices and terms of sale were not disclosed. See U.S. Dep't of Agric., *Livestock Mandatory Reporting Program: Background <<http://www.ams.usda.gov/lsg/mpr/mprbackground.htm>>* (visited Sept. 29, 2000). Of note, Petitioner USDA heralded the mandatory price reporting requirement as "a move to help level the playing field" and emphasized that the program "will help producers by making the market more transparent, giving them better information about what's happening in the marketplace." U.S. Dep't of Agric., *Glickman Announces Mandatory Livestock Price Reporting* (Mar. 14, 2000) (press release) *<<www.usda.gov/ news/releases/2000/03/0081.htm>>* (visited Sept. 29, 2000).

The USDA has also implemented a commodity purchase program pursuant to which the government buys beef for use in federal food programs such as the school lunch program. Petitioner itself has emphasized that such programs "assist[] farmers, commodity producers, and processors by helping maintain stable commodity prices." U.S. Dep't of Agric., Agricultural Mktg. Serv., *Commodity Purchase Programs <<www.ams.usda.gov/lsg/ls-cp.htm>>* (visited Sept. 27, 2000); Hord, *supra* (announcement of additional government purchase of beef to "help offset a surplus supply of fed cattle that is depressing prices to ranchers, farmers and feedlot operators").

Also unlike mushroom producers, the beef industry is subject to numerous federal health and safety requirements that eliminate differentiation based on varying levels of safety, sanitation, and quality, thereby making beef effectively a fungible commodity. The president of the American

Meat Institute has thus described meat and poultry manufacturers as "the most intensely regulated segment of the U.S. food industry." James H. Hodges, *Meat and Poultry Regulatory Update*, 54 Food Drug L.J. 459, 460 (1999). For decades, USDA employees have inspected every carcass (137.5 million head of livestock in 1996 alone) that moves through slaughterhouses and processing plants, see Edward Walsh, *USDA Shift Puts Safety in Packers' Hands; Meat Inspectors Fight to Keep Role*, WASH. POST, Oct. 20, 1998, at A17, and – as of 1998 – had nearly eight thousand inspectors posted in more than six thousand slaughterhouses or processing plants in the United States and its territories. See U.S. Dep't of Agric., *1998 Agriculture Fact Book*, ch. 9. More recently, the USDA has promulgated new regulations, known as the Hazard Analysis and Critical Control Point Systems, that require each meat or poultry producer to implement a plan to identify and reduce the risk of bacterial contamination in slaughterhouses and processing plants. See 9 C.F.R. Pt. 304. Under the new regulations, USDA inspectors monitor compliance with the plans and test samples for contamination. *Id.*

Further, the Mushroom Order itself differs from the parallel beef regulation in two critical respects. First, the Mushroom Act expressly states that it shall not be construed "to provide for the control of production or otherwise limit the right of individual producers to produce mushrooms," 7 U.S.C. § 6101(c), and the Secretary of Agriculture has provided that the Mushroom Order shall not be construed to authorize "mandatory requirements for quality control, grade standards, supply management programs, or other programs that would control production," 7 C.F.R. § 1209.40(a)(2). The provision for beef contains a far more limited statement that the statute will not be "construed to limit the right of individual producers to raise cattle," 7 U.S.C. § 2901(b), and, as noted, the federal government is heavily involved in regulating beef production.

Third, assessments are imposed under the Mushroom Order only upon persons who produce or import more than 500,000 pounds of mushrooms annually, 7 C.F.R. § 1209.52(a), for sales in the fresh market, see 7 U.S.C. § 6102(9) (excluding "mushrooms that are commercially marinated, canned, frozen, cooked, blanched, dried, packaged in brine, or otherwise processed" from definition of "mushroom" for purposes of the Mushroom Act). The Sixth Circuit was therefore correct to hold in this case that the mushroom assessment could not be sustained on the ground that it prevents market participants from "free riding" on other mushroom advertising, Pet. App. 8a, given that the Order itself exempts a very large number of producers and importers from paying based on the volume of their production or imports or the end uses of their mushrooms.[5] The beef assessment, by contrast, applies to *all* sales of cattle, such that there is a much more substantial argument that the assessment is a valid effort to prevent free riding. See U.S. Dep't of Agric., Agricultural Mktg. Serv., *Beef Promotion and Research Order* <<*www.ams.usda.gov/lsg/mpb/beef/beefchk.htm*>> (visited Sept. 27, 2000) ("All producers owning and marketing cattle, regardless of the size of their operation or the value of their cattle, must pay the assessment."). For all these reasons, there is no reason to believe either that the Third and Tenth Circuits would sustain the assessment for mushrooms or that the Sixth Circuit would invalidate the assessment for beef (particularly

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[5] The free-riding problem is significant indeed. Among other things, to the extent the Council's generic advertising increases demand for fresh mushrooms, producers of principally processed mushrooms (which are exempt from the assessment, 7 U.S.C. § 6102(9)) can meet that increased demand by shifting their sales to the fresh market.

given that it has sustained the assessment for the similarly regulated milk industry, see *supra* at 14 n.3).[5]

There is, accordingly, no circuit conflict at all, much less one that would merit certiorari.

III. Petitioner's Remaining Arguments For Granting Certiorari Are Not Persuasive.

1. Petitioner also asserts that certiorari should be granted because the Sixth Circuit invalidated an Act of Congress. Pet. 8, 15. But Petitioner's argument misdescribes the breadth of the court of appeals' holding. This case involves the mandatory assessment for advertising and public relations campaigns, which is not intrinsically tied to promotion efforts since such programs need not be compulsory (and, in fact, generally were voluntary until the late 1980s, see *Frame*, 885 F.2d at 1122 n.1 (noting that wool promotion program did "not provide for mandatory assessments"); *id.* at 1147 n.2 (Sloviter, J., dissenting) (citing statutory provisions for cotton, watermelon, potatoes, and honey)). Indeed, notwithstanding the Sixth Circuit's decision, even the Council's promotion efforts can be continued through voluntary assessments, see 7 C.F.R. § 1209.50(d), which seems the likely result in light of Petitioner's view that the program is widely supported by other mushroom producers and importers, Pet. 4.

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[5] Viewed objectively, the government's actions make clear that it too views the beef assessment as valid under the Sixth Circuit's decision. Respondent has confirmed with the Solicitor General that the USDA continues to collect the beef assessment within the states that comprise the Sixth Circuit. The USDA can collect that assessment only if it believes that the judgment below, which became binding when the Sixth Circuit's mandate issued several months ago, is not dispositive as to the beef assessment. (Not surprisingly, as to the government's food promotion programs, the proof is in the pudding.)

Nor is there any substantial argument that the promotion program as a whole, much less the vitality of the assessment in the few states within the Sixth Circuit's jurisdiction, has larger consequences for the industry generally or was seriously regarded by Congress as an essential national endeavor. The government has derisively rejected the claim that a ruling by one circuit invalidating the mushroom program would have broader application, maintaining that "[t]he Secretary enjoys a national jurisdiction and is not constrained by law or policy to knee-jerk subservience to the dictates of any district or circuit court." C.A. App. 115-16. That is an important point because the decision below impacts an exceedingly small proportion of U.S. mushroom production, and therefore of mushroom assessments. U.S. Dep't of Agric., *Fruit and Vegetable Programs: Mushroom Promotion, Research, and Consumer Information Order* <<*www.ams.usda.gov/fv/rpmushroom.html*>> (visited Oct. 5, 2000) (reporting that Ohio and Michigan "each accounted for about 2 percent" of total U.S. production, in contrast to Pennsylvania (47%) and California (17%)). (There is only one substantial mushroom farm, producing approximately 15 to 20 million pounds of mushrooms annually [less than 2.5% of national production], in Tennessee. Respondent is not aware of any substantial mushroom farms in Kentucky, the fourth state within the Sixth Circuit.)[7]

The Mushroom Act itself, it must be stressed, does not mandate the use of paid promotions at all. Furthermore, either the Secretary of Agriculture or a majority of producers and importers can terminate the *entire* Mushroom Order at

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[7] The anomaly that United Foods is subject to the Sixth Circuit's decision notwithstanding that its mushroom production occurs in California, Oregon, and Utah arises because Petitioner brought this suit against United Foods in Tennessee apparently in order to avoid the force of the Ninth Circuit's then-binding decision in *Wileman*, which this Court only later reversed.

any time and for any reason without congressional approval. See 7 U.S.C. §§ 6105(b) (producer/importer referenda), 6110 (termination by Secretary). Thus, *no* Act of Congress was invalidated below – only an administrative order of potentially quite limited duration.

2. Petitioner also seriously overstates matters in arguing that the Sixth Circuit's decision "'threaten[s] the whole scheme'" of mushroom promotion because it will "encourage wider non-compliance.'" Pet. 13 (quoting *United States* v. *Ruzicka*, 329 U.S. 287, 293 (1946)). Respondent has confirmed with the Solicitor General that the government is not aware of a *single* producer that is not paying assessments based on the Sixth Circuit's decision. Furthermore, the Solicitor General advises Respondent that, so far as he is aware, the government is not presently litigating the constitutionality of *any* federal commodity assessment program at either the administrative or judicial level *anywhere* in the country.

Moreover, the decision on which Petitioner relies, *United States* v. *Ruzicka*, in reality rejects Petitioner's assertion that the failure to collect assessments from particular producers threatens the integrity of the commodity promotion programs. The language quoted by Petitioner reflects this Court's concern that challenges to assessments must be brought first in administrative proceedings rather than, as in that case, through a plenary action in federal court. This Court explained that Congress "avoided [the] hazards [of noncompliance] by the procedure it devised for the careful administrative and judicial consideration of a handler's grievance." 329 U.S. at 293. The same reasoning applies fully here, given that challenges to assessments under the Mushroom Act must be brought first in administrative proceedings and only later in court. See 7 U.S.C. § 6106. As *Ruzicka* explains, this orderly

framework for disposing of challenges to the Mushroom Order will avoid the "hazards" now hypothesized by Petitioner.[8]

3. Finally, it is worth noting three special considerations that make this case an inappropriate vehicle to resolve any broader questions or disagreements in the lower courts regarding the constitutionality of compelled advertising assessments. First and foremost, the parties developed essentially no record at all in the lower courts regarding the nature of the mushroom industry or the efficacy of the Mushroom Council's promotion program. United Foods' motion to adopt in this case the factual record from another proceeding was rejected by the administrative law judge based on Petitioner's objection. See *supra* at 5 (quoting Order Granting Motion To Stay Proceedings, No. 96-1252, *United States* v. *United Foods*, at 4 (W.D. Tenn. Feb. 11, 1997)); United Foods' Memorandum In Support Of Its Response To The Government's Motion To Dismiss, No. 96-1252, *United States* v. *United Foods*, at 7 (W.D. Tenn., filed July 9, 1998) ("The most important aspect of the history of this case is that the United States Department of Agriculture dismissed United Foods' administrative petition, ostensibly on purely legal grounds, without an evidentiary hearing.").

Second, the Mushroom Act presents the extreme example of a compelled promotion program for an entirely unregulated commodity. A decision in this case is accordingly unlikely to

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[8] Furthermore, any risk that other producers will cease paying assessments is a dilemma that results only from Petitioner's refusal to stipulate that producers whose challenges to assessments are eventually sustained will be entitled to reimbursement of payments they make in the interim. See Order Granting Motion To Stay Proceedings, No. 96-1252, *United States* v. *United Foods*, at 5 (W.D. Tenn. Feb. 11, 1997) ("The Secretary is delaying the progress of United Foods' administrative proceeding because it strongly suspects the ALJ's decision will be unfavorable, yet simultaneously seeks to pursue an enforcement action without even stipulating to a refund should United Foods ultimately prevail.").

shed light on the constitutionality of many other programs involving products that are substantially regulated such as those for beef and milk, which are also of far greater economic and social significance.

Third, this is one of the first cases under *any* compelled advertising scheme to make its way from the administrative level to a federal court of appeals in the wake of *Wileman*. Absent an urgent basis for granting review, which does not exist in this case, it would be more prudent to await additional rulings by the courts of appeals on various other assessment programs, which no doubt will shed light on the nature of the various markets and advertising programs administered by the federal government.[9]

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[9] The benefits of percolation are also apparent, for example, from the fact that even Petitioner cannot determine what rules have been adopted by the various circuits. Thus, the government argues here that the Ninth Circuit's decision sustaining the milk assessment in *Gallo Cattle Co.* v. *California Milk Advisory Board*, 185 F.3d 969 (1999), turns on the degree of industry regulation and therefore accords with the Sixth Circuit's decision in this case. See Pet. 12. This notwithstanding that the government read *Gallo* to support precisely the opposite proposition below. Govt's Pet. for Rhg. and Rhg. *En Banc*, No. 98-6436, *United Foods* v. *United States* 6 n.3, 10 n.7, 13 n.8; see also Rule 28(j) Letter Of The United States, No. 98-6436, *United Foods* v. *United States*, at 2 (dated Aug. 24, 1999).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 00-276

In the Supreme Court of the United States

UNITED STATES OF AMERICA AND UNITED STATES DEPARTMENT OF AGRICULTURE, PETITIONERS

v.

UNITED FOODS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

This case concerns the constitutionality of the assessments imposed on members of the mushroom industry, pursuant to the Mushroom Promotion, Research, and Consumer Information Act of 1990 (Mushroom Act), 7 U.S.C. 6101 *et seq.*, to fund a generic advertising program designed to support that industry. The Sixth Circuit, distinguishing *Glickman* v. *Wileman Bros. & Elliott*, 521 U.S. 457 (1997), held that the Mushroom Act and the Secretary of Agriculture's implementing regulations violate the First Amendment to the extent they require the payment of such assessments. The Tenth Circuit, in contrast, has upheld under *Wileman* the assessments imposed under the virtually identical advertising program authorized by the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. 2901 *et seq.*

1. Respondent identifies no case in which this Court has denied the government's request to review a decision of a federal court of appeals invalidating all, or any significant part, of an Act of Congress.[1] That is precisely what the court of appeals did here, contrary to respondent's claim (at 23) that "*no* Act of Congress was invalidated below—only an administrative order." The court of appeals could not have been clearer that it was invalidating the Mushroom Act to the extent that it provides for mandatory payments by members of the industry:

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[1] We are aware of only one such case, *FCC* v. *Action for Children's Television (ACT)*, 503 U.S. 914 (1992) (No. 91-952), which concerned the regulation of "indecent" broadcasting. Because the court of appeals remanded that case to the FCC for further proceedings, the case was in an interlocutory posture, and the respondents argued, *inter alia*, that the caes was not ripe for review. Br. of Respondents ACT *et al.* at 18-19. In addition, the respondents argued that, because the court of appeals panel included then-Judge Thomas, who had since been appointed to this Court, the case could produce an equally divided Court. *Id.* at 19 n.39. This case presents neither of those circumstances.

> [T]he effort by the Department of Agriculture to force payments from plaintiff for advertising is invalid under the First Amendment. *The portions of the Mushroom Act of 1990 which authorize such coerced payments for advertising are likewise unconstitutional.* (Pet. App. 8a (emphasis added)).

Nor is the Mushroom Act merely agnostic, as respondent suggests (at 21-23), as to whether payments to fund the advertising program are to be mandatory or voluntary. Several provisions of the Act make clear that such payments are to be mandatory.

First, the Mushroom Act states that any order establishing an advertising program "*shall* provide that *each* first handler of mushrooms for the domestic fresh market produced in the United States *shall* collect * * * assessments from producers." 7 U.S.C. 6104(g)(1)(A); see 7 U.S.C. 6104(g)(1)(B) and (C) (similar provisions applicable to "each importer of mushrooms for the domestic fresh market" and "[a]ny person marketing mushrooms of that person's own production directly to consumers"). In using the term "assessments" and the mandatory word "shall"—and by specifying that the assessments are to be remitted by "each" handler, "each" importer, and "any" direct marketer—Congress made it clear that payment was not a voluntary matter.

Second, the Mushroom Act provides that any order establishing an advertising program is to take effect only if approved in a referendum of producers and importers. 7 U.S.C. 6105(a); see also 7 U.S.C. 6105(b)(1)(A) and (B) (providing for a second referendum after five years and additional referenda if requested by producers and importers). If participation in the advertising program were voluntary, there would be little need for such referenda; those producers and importers who supported the program would participate, and those who opposed the program would not.

Third, the Mushroom Act provides that any order establishing an advertising program "shall contain * * * provisions for the assessment of a penalty for each late payment of assessments." 7 U.S.C. 6104(j). In addition, the Act provides for enforcement of the order in district court, including the imposition of a monetary penalty against anyone "who fails or refuses to pay, collect, or remit any assessment or fee duly required of the person under such order." 7 U.S.C. 6107(c)(1). Such provisions would serve no purpose if payment of assessments were purely voluntary.

Thus, in holding that "[t]he portions of the Mushroom Act of 1990 which authorize such coerced payments for advertising are * * * unconstitutional" (Pet. App. 8a), the court of appeals was invalidating the mechanism that Congress itself chose to assure adequate funding of the advertising program. The court was not, as respondent claims (at 23), merely invaliding "an administrative order."

2. As we explain in the certiorari petition (at 8-11), the court of appeals' decision in this case is inconsistent with *Wileman*, which rejected a First Amendment challenge to generic advertising programs for California fruits that were financed by assessments on producers. The Court identified three characteristics that distinguish those programs—which *enhance* speech—from laws that have been held to "abridge" speech: they "impose no restraint on the freedom of any producer to communicate any message to any audience," they "do not compel any person to engage in any actual or symbolic speech," and they "do not compel the producers to endorse or to finance any political or ideological views." 521 U.S. at 469-470. The advertising program for mushrooms is indistinguishable, in all three respects, from the advertising programs in *Wileman*.

Respondent nonetheless contends (at 8) that the Sixth Circuit's holding "is compelled by" this Court's decision in *Wileman*. Respondent bases that contention largely on the Court's preliminary description in *Wileman* of the "statutory

context" in which the case arose, which noted that the marketing orders at issue "displaced many aspects of independent business activity," such as by setting maturity and minimum size standards for the fruits. 521 U.S. at 463, 469. We explain in the petition (at 10-11) why we do not read the Court's First Amendment holding to rest on that discussion of the California fruit industry. That discussion does not appear in the section of the Court's opinion that addresses why the advertising programs are unlike laws that violate the First Amendment. See 521 U.S. at 469-474. It instead appears principally in the preceding section, which identifies what is, and is not, at issue in the case. See *id.* at 469.[2]

Nowhere in *Wileman* did the Court state that its holding was limited to advertising programs included in marketing orders that extensively regulate an agricultural commodity. To the contrary, the Court noted that it had granted certiorari in *Wileman* "to resolve the conflict" with *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), cert. denied, 493 U.S. 1094 (1990), which involved the advertising program authorized by the Beef Act and implemented by an order of the Secretary that does not otherwise regulate the beef industry. 521 U.S. at 467. The Court was made aware of the differences in regulatory scope between the orders in *Wileman* and *Frame*. See Oral Arg. Tr. at 26, *Wileman* (government counsel explains that "[t]he beef program focuses almost exclusively on promotional programs and advertising"); *Frame*, 885 F.2d at 1122-1124. Yet, the Court did not even suggest that the advertising programs in both cases were

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[2] It has been suggested that "the point" of the discussion of the regulatory context in *Wileman* was that "the advertising tool merely seeks to accomplish the same goals as equally or more invasive tools, such as price, quantity, quality and labeling restrictions," and thus that "no greater weight should be given to the fact that the advertising tool involves an activity that, in other contexts, is 'commercial speech' protected by the First Amendment." *Gerawan Farming, Inc.* v. *Veneman*, 85 Cal. Rptr. 2d 598, 605 (Ct. App.), review granted, 983 P.2d 728 (Cal. 1999).

not equally constitutional. Thus, respondent's assertion (at 8) that *Wileman* somehow "compelled" the invalidation of the advertising program for mushrooms is baseless.

Respondent also contends (at 10) that a decision sustaining the mushroom advertising program would "go far beyond any of this Court's compelled speech precedents and permit the government to compel private parties to finance *any* commercial message of the government's choosing." In the first place, the Court has explained that advertising programs of the sort at issue here and in *Wileman* "do not compel any person to engage in any actual or symbolic speech," a "fact [that] distinguishes" such programs from the laws at issue in the Court's "compelled speech" precedents. 521 U.S. at 469 & n.13. Moreover, while noting that its precedents also recognize "a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief,'" *id.* at 471, the Court explained that no such interest was implicated in *Wileman* because "(1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, (2) in any event, the assessments are not used to fund ideological activities," *id.* at 473. Those same characteristics are present here. The advertising program is "unquestionably germane" to the purposes of the Mushroom Act—which include "strengthen[ing] the mushroom industry's position in the marketplace" and "maintain[ing] and expand[ing] existing markets and uses for mushrooms," 7 U.S.C. 6101(b)(1) and (2)—and, "in any event," the assessments "are not used to fund ideological activities." 521 U.S. at 473. A decision upholding the mushroom program thus would not, as respondent asserts (at 10), give the government free rein to "compel private parties to finance *any* commercial message."

3. Respondent next asserts (at 13) that our contention that the decision below creates a conflict that merits the Court's resolution "is strained indeed, given that no other

federal or state court has *ever* even considered the constitutionality of [the mushroom] program." We note as a threshold matter that respondent's assertion is factually inaccurate. A federal district court in California (in an unpublished opinion appended to respondent's own brief in the court of appeals) upheld the assessments under the Mushroom Act against the same challenges raised here. See *Donald B. Mills, Inc.* v. *United States Dep't of Agriculture*, No. CV-F-97-5890 OWW SMS (E.D. Cal. Mar. 5, 1998), slip op. 8 (holding that "[n]othing in *Glickman* [v. *Wileman*] dictates that a contrary outcome is mandated for a 'stand-alone' advertising program" such as the program for mushrooms). More fundamentally, however, the conflict that (quite aside from the holding of an Act of Congress unconstitutional) warrants this Court's intervention is not with *Mills*, but with *Goetz* v. *Glickman*, 149 F.3d 1131 (10th Cir. 1998), cert. denied, 525 U.S. 1102 (1999). None of respondent's attempts to deny the existence of that conflict is meritorious.

First, respondent suggests (at 14) that no circuit conflict exists because *Goetz* involved the Beef Act while this case involves the Mushroom Act. As our petition explains (at 11), however, the two statutes are substantively identical; both are concerned almost exclusively with the establishment of programs to promote an agricultural commodity that are funded by assessments on producers or handlers. Compare 7 U.S.C. 2901 *et seq.* with 7 U.S.C. 6101 *et seq.* The Secretary's orders implementing those programs are also identical in all pertinent respects. Compare 7 C.F.R. Pt. 1260 (Beef Order) with 7 C.F.R. Pt. 1209 (Mushroom Order). Indeed, this Court recognized a circuit "conflict" in *Wileman*, 521 U.S. at 467, where the Ninth Circuit invalidated, but the Third Circuit upheld, advertising programs established under statutes and orders *less* similar than those here.

Second, respondent argues (at 14-15) that the First Amendment claim in *Goetz* "is distinguishable from and, indeed, is unrelated to" the First Amendment claim here.

Respondent is mistaken. The Tenth Circuit described the plaintiff's claim in *Goetz* as being that "the assessment violates his First Amendment right because he is compelled to support advertising which promotes beef consumption." 149 F.3d at 1138. Respondent's claim here is likewise that the assessment violates its First Amendment rights because it is compelled to support advertising that promotes mushrooms. C.A. App. 22 (Compl. ¶ 30). Moreover, as we note in the petition (at 11), the plaintiff in *Goetz* argued that his case was not controlled by *Wileman* because the Beef Act "is not an overall regulatory scheme like the [Agricultural Marketing Agreement Act]," under which the orders at issue in *Wileman* were issued; the plaintiff also argued that "[u]nlike the fact situations to which the *Wileman* decision has been restricted, the beef industry is * * * a highly competitive industry." Appellant's Supp. Br. at 6, *Goetz;* see also *id.* at 7 (contending that "limitations" in the *Wileman* opinion "restrict it from applying" to the Beef Act).[3] Thus, when the Tenth Circuit held that "under the Supreme Court's decision in *Wileman Bros.*, Goetz' First Amendment claim is fruitless," 149 F.3d at 1139, that court was plainly rejecting his attempts to distinguish *Wileman* on the very grounds advanced by respondent here.

Third, respondent contends (at 15) that this case and *Goetz* are distinguishable on the ground that "the market for beef is less stable and (in part for that reason) more heavily regulated than the market for mushrooms," albeit under statutes other than the Beef Act. But the Tenth Circuit in *Goetz* did not even suggest, much less hold, that such considerations had any bearing on the constitutionality of the advertising program for beef.[4] Nor did the Sixth Circuit

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[3] In advance of the filing of the response to our certiorari petition in this case, we provided respondent's counsel with copies of our briefs and the appellant's supplemental (post-*Wileman*) brief in *Goetz*.

[4] In fact, the Livestock Mandatory Reporting Act of 1999, Pub. L. No. 106-78, 113 Stat. 1188 (to be codified at 7 U.S.C. 1635 *et seq.*), one of the

give any indication in this case that *any* "stand-alone" advertising program would withstand constitutional scrutiny.

In a footnote, respondent argues (at 21 n.5) that the government itself must perceive a distinction between the advertising programs for mushrooms and beef, because the Department of Agriculture is continuing to collect assessments under the beef program in the Sixth Circuit notwithstanding the decision below. Respondent's argument rests on the premise that the Department, in contrast, has ceased collecting assessments under the mushroom program in the Sixth Circuit. That is incorrect. As we informed respondent by letter dated October 13, 2000 (a copy of which we have lodged with the Clerk), USDA continues to collect assessments under *both* programs in the Sixth Circuit pending this Court's review because, in light of our pending certiorari petition, the decision below is not final binding precedent in that circuit.

4. Respondent concludes (at 23-25) with various other arguments as to why certiorari should not be granted. None of those arguments provides any persuasive reason to deny review, and thereby to allow the uncertainty created by the court of appeals' decision to fester.

First, respondent complains (at 23) that, since we have not identified any case currently challenging the constitutionality of federal generic advertising programs or any grower (other than respondent itself) currently withholding assessments under the mushroom program based on the Sixth Circuit's decision, we have "seriously overstate[d]" the significance of this case. As to the first point, while no cases presenting First Amendment challenges to federal advertising programs are pending, several such cases have been concluded in the past two years. All of those cases upheld

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statutes on which respondent relies (at 17-18) to distinguish the regulatory contexts applicable to beef and mushrooms, had not even been enacted when the Tenth Circuit decided *Goetz*.

those programs against First Amendment challenges.[5] It is not surprising that such cases tapered off after this Court's decision in *Wileman* and the subsequent unanimity of appellate decisions upholding advertising programs. The decision in this case, if allowed to stand, would destroy that unanimity, and thus invite a new round of litigation.

As to the second point, we have been informed by the Department of Agriculture (and informed counsel for respondent) that several mushroom producers (in addition to respondent) are in arrears in their assessments under the mushroom program. Until USDA commences formal collection proceedings against those producers (which cannot occur for several months), USDA has no mechanism for learning why they are withholding payments. Nor does the fact that relatively few producers have thus far withheld assessments detract from the significance of this case. Indeed, given that the government's decisions to seek rehearing and then certiorari in this case have been widely publicized among mushroom producers, even those who share respondent's views might prudently have chosen to continue paying assessments until this case is finally resolved.

Second, respondent asserts (at 24) that this case would be "an inappropriate vehicle" to decide the constitutionality of assessments under the Mushroom Act, because there is no extensive record "regarding the nature of the mushroom industry or the efficacy of the Mushroom Council's promotion program." But a central teaching of *Wileman* is that inquiries into the efficacy of generic advertising programs, like other economic regulations, are properly left to Congress, the Secretary, and the producers themselves by majority vote. See, *e.g.*, *Wileman*, 521 U.S. at 468, 476.

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[5] See *Cal-Almond Inc.* v. *United States Dep't of Agriculture*, 192 F.3d 1272 (9th Cir. 1999), cert. denied, 120 S. Ct. 2215 (2000); *Goetz*, 149 F.3d at 1138-1139; *Gallo Cattle Co.* v. *United States Dep't of Agriculture*, 189 F.3d 473 (9th Cir. 1999) (Table); *Nature's Dairy* v. *Glickman*, 173 F.3d 429 (6th Cir. 1999) (Table).

Accordingly, if the Court concludes, consistent with our position, that the advertising program in this case should be analyzed in the same manner as those in *Wileman*, the Court would have no need to consult the sort of record described by respondent. Alternatively, if the Court were to conclude that a different analysis should be applied, the Court could remand the case for the compilation of whatever record might be necessary. But the absence of a more extensive factual record is no reason to deny review, since the court of appeals has entered a judgment invalidating an Act of Congress. Unless reviewed by this Court, that judgment will become final and binding.

Finally, respondent asserts (at 24-25) that "[a] decision in this case is * * * unlikely to shed light on the constitutionality of many other programs involving products that are substantially regulated." In the first place, even if one were to accept respondent's assertion (at 24) that "the Mushroom Act presents the extreme example of a compelled promotion program," a decision upholding that program would almost certainly resolve the constitutionality of other programs that respondent would characterize as less "extreme." Moreover, as our petition explains (at 13-14 & n.7), the advertising program established under the Mushroom Act is virtually identical to programs established under a number of other statutes. Respondent, while asserting (at 25) that the advertising programs for beef and milk are distinguishable because those products are more "substantially regulated," does not even attempt to distinguish the programs that we identified for ten other agricultural products.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 2000

Supreme Court, U.S.
FILED
JAN 24 2001
OFFICE OF THE CLERK

(16)

No. 00-276

In the Supreme Court of the United States

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS

v.

UNITED FOODS, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: AUGUST 18, 2000
CERTIORARI GRANTED: NOVEMBER 27, 2000

244 pp

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE (JACKSON)

Civil No. 96-CV-1252

UNITED STATES

v.

UNITED FOODS, INC.

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/16/96	1	COMPLAINT (Summons(es) issued) (gn) [Entry date 10/17/96] [1:96cv1252]
11/6/96	2	MOTION by USA for summary judgment or, in the alternative, for a preliminary injunction - CJT wpo (pb) [1:96cv1252]

DATE	DOCKET NUMBER	PROCEEDINGS
11/6/96	3	MEMORANDUM by USA in support of motion for summary judgment (2-1), of motion for a preliminary injunction [2-2] w/attmts: declaration of Wade Whitfield; report; cpy of check - CJT (pb) [1:96cv1252]
11/29/96	4	NOTICE OF FILING OF WAIVER OF SERVICE OF SUMMONS by defendant United Foods, Inc. w/attd waiver - CJT (pb) [Entry date 12/02/96] [1:96cv1252]
1/14/97	5	ANSWER by defendant United Foods, Inc. to cmplt [1-1] - CJT (pb) [1:96cv1252]
1/14/97	6	MOTION by defendant to stay proceedings w/attmt: COA decision, 9th Cir. - CJT (pb) [1:96cv1252]
1/14/97	7	MOTION by defendant to file a memorandum in excess of page limitation - CJT wpo (pb) [1:96cv1252]

DATE	DOCKET NUMBER	PROCEEDINGS
1/14/97	8	RESPONSE by defendant to motion for summary judgment [2-1], to motion for a preliminary injunction [2-2] - CJT (pb) [1:96cv1252]
1/14/97	9	BRIEF IN OPPOSITION by defendant regarding motion for sum jgm [2-1], regarding motion for prel inj [2-2] - CJT (pb) [1:96cv1252]
1/14/97	9	BRIEF by defendant in support of motion to stay [6-1] - CJT (pb) [1:96cv1252]
1/14/97	10	DECLARATION by defendant in support of dft's opposition [9-1] to plt's motion for sum jgm or, in the alternative, for prel inj w/attd Exhs: 1. United Food's administrative peition; 2. Admin Law Judge decision; 3. ALJ's decision on respondent's motion for reconsideration; 4. excerpts from transcript of Mills hearing; 5. - ALJ's "Summary of Telephone Conference" - CJT (pb) [1:96cv1252]

DATE	DOCKET NUMBER	PROCEEDINGS
1/14/97	11	SETTING LETTER: scheduling conference set for 2/13/97 at 11:00 before MagJBreen Rm 320 Fed Bldg Jackson (bph) [1:96cv1252]
1/29/97	12	SETTING LETTER: scheduling conference reset for 2/24/97 at 9:30 before Mag J Breen (bph) [Entry date 01/30/97] [1:96cv1252]
2/6/97	13	ORDER by Judge James D. Todd granting motion to file a memorandum in excess of page limitation [7-1] - CJT (cc: all counsel) (pb) [Entry date 02/07/97] [1:96cv1252]
2/11/97	14	ORDER by Judge James D. Todd granting dft United Foods motion to stay proceedings [6-1], CASE STAYED (cc: all counsel) (skp) [1:96cv1252]

DATE	DOCKET NUMBER	PROCEEDINGS
2/14/97	15	REPLY by USA to response to motion for summary judgment [2-1], motion for a preliminary injunction [2-2] w/attmts: A. opinion/order USDC WD/MI; B. summary of teleconference—stay order; C. transcript; D. USDA report re mushrooms - CJT (pb) [1:96cv1252]
3/7/97	16	MEMORANDUM by plaintiff in support of plt's motion for reconsideration of stay order - CJT wpo (pb) [1:96cv1252]
3/18/97	17	RESPONSE TO THE MOTION FOR RECONSIDERATION by defendant - CJT (pb) [1:96cv1252]
3/20/97	18	ORDER DENYING MOTION FOR RECONSIDERATION by Judge James D. Todd re Memorandum in support of Plaintiff's Motion for Reconsideration of Stay Order[16-1] (cc: all counsel)CJT (bph) [1:96cv1252]

DATE	DOCKET NUMBER	PROCEEDINGS
2/17/98	19	ORDER by Judge James D. Todd stay lifted and granting addtnl time to file supplmtl memoranda. The court hereby allows the United States an addtnl twenty (20) days in which to file a supplmtl memo in support of USA's motion for sum jgm, or in the alterantive [sic] for prel inj. United Foods will then have twenty (20) days in which to respond - CJT (cc: all counsel) (pb) [Entry date 02/18/98] [1:96cv1252]
3/23/98	20	MOTION by defendant to consolidate cases w/Exh: A. cmplt in action 98-1082 - CJT (pb) [1:96cv1252]
3/27/98	21	MOTION by defendant United Foods, Inc. for attorney Bradley A. MacLean to appear pro hac vice w/cert of good standing - CJT wpo (pb) [Entry date 03/30/98] [Edit date 03/30/98] [1:96cv1252]

DATE	DOCKET NUMBER	PROCEEDINGS
3/27/98	22	PRO HAC VICE FEE PAID: in the amount of $10.00 receipt # 19095 by Farris, Warfield & Kanaday on behalf of atty Bradley A. MacLean (pb) [Entry date 03/30/98] [1:96cv1252]
3/27/98	23	ORDER by Judge James D. Todd granting motion for attorney Bradley A. MacLean to appear pro hac vice [21-1] - CJT (cc: all counsel) (pb) [Entry date 03/30/98] [1:96cv1252]
4/17/98	24	ORDER by Judge James D. Todd granting motion to consolidate cases [20-1] 1:96-cv-1252 with member cases 1:98-cv-1082 - CJT (cc: all counsel) (pb) [Entry date 04/20/98]
5/12/98	25	ATTORNEY APPEARANCE for USA by atty Pamela J. Aronson (recd fr Mphs) - CJT (pb) [Entry date 05/15/98] [1:96cv1252]

DATE	DOCKET NUMBER	PROCEEDINGS
5/21/98	26	MOTION by govt dft AGRI (US Dept of Agriculture) in 1:98-cv-01082 to dismiss, or, in the alterntive [sic], for summary judgment - CJT (pb) [Entry date 05/22/98] [1:96cv 1252 1:98cv1082]
5/21/98	27	MEMORANDUM by govt dft AGRI (US Dept of Agriculture) in 1:98-cv-01082 in support of motion to dismiss [26-1] in 1:98-cv-01082, of motion for summary judgment [26-2]in 1:98-cv-01082 w/Exhs: 1-2. USDC memorandum opinion/orders; 3. order; 4. program announcement; 5. USDA petition; 6. USDA decision/order of dismissal; 7. USDA decision/order - CJT (pb) [Entry date 05/22/98] [1:96cv1252 1:98cv1082]

DATE	DOCKET NUMBER	PROCEEDINGS
6/19/98	28	MOTION by defendant United Foods, Inc. in 1:96-cv-01252, plaintiff United Foods, Inc. in 1:98-cv-01082 to extend time to file resp to the govt's motion to dism - CJT wpo (pb)[Entry date 06/22/98] [1:96cv1252 1:98cv1082]
6/22/98	29	ORDER by Judge James D. Todd granting motion to extend time to file resp to the govt's motion to dism [28-1] in 1:96-cv-01252, 1:98-cv-01082 - CJT (cc: all counsel) (pb) [Entry date 06/23/98] [1:96cv1252 1:98cv1082]
7/9/98	31	RESPONSE by defendant United Foods, Inc. to motion to dismiss [26-1] - CJT (pb) [Entry date 07/13/98] [1:96cv1252]
7/9/98	32	AFFIDAVIT of Donald Dresser w/Exh: A. Mushroom Council 1997 Management Report - CJT (pb) [Entry date 07/13/98] [1:96cv1252]

DATE	DOCKET NUMBER	PROCEEDINGS
7/9/98	33	MEMORANDUM by defendant in 1:96-cv-01252 in support of motion response [31-1] w/Exh: 1. article by Justice John Paul Stevens, "The Freedom of Speech" - CJT (pb) [Entry date 07/13/98] (1:96cv1252]
7/10/98	30	SETTING LETTER; scheduling conference set for 4:00 7/30/98 Rm 320 Fed Bldg Jackson before MagJBreen (bph) [1:96cv1252]
7/17/98	34	REPLY by USA to response to motion to dismiss [26-1], motion for summary judgment [26-2] w/Exh: 1. US COA opinion (recd fr Mphs 7/20/98) - CJT (pb) [Entry date 07/21/98] [1:96cv1252]
7/27/98	35	SETTING LETTER; scheduling conference reset for 9:15 9/10/98 Rm 320 Fed Bldg Jackson before MagJBreen (bph) [1:96cv1252]

DATE	DOCKET NUMBER	PROCEEDINGS
7/28/98	36	ORDER by Judge James D. Todd granting motion for summary judgment [26-2], granting motion for summary judgment [2-1] terminating party United Foods, Inc. in 1:96-cv-01252, - CJT wpj, OB (cc: all counsel) (pb) [Entry date 07/29/98] [1:96cv1252]
7/31/98	37	JUDGMENT: in favor of pla USA by Judge James D. Todd dismissing case and (1:98-cv-01082) consolidation termed (cc: all counsel) (skp) [Entry date 08/03/98] [1:96cv1252]
8/12/98	38	MOTION by plaintiff USA to alter or amend jgmt (recd fr Mphs 8/14/98) - CJT (pb) [Entry date 08/14/98] [1:96cv1252]
8/12/98	39	MEMORANDUM by plaintiff USA in support of motion to alter or amend jgmt [38-1] (recd fr Mphs 8/14/98) - CJT (pb) [Entry date 08/14/98] [1:96cv1252]

DATE	DOCKET NUMBER	PROCEEDINGS
8/21/98	40	RESPONSE by defendant United Foods, Inc. to motion to alter or amend jgmt [38-1] - CJT (pb) [Entry date 08/24/98] [1:96cv1252]
9/4/98	41	ORDER by Judge James D. Todd denying motion to alter or amend jgmt [38-1] (cc: all counsel) CJT (bph) [1:96cv 1252]
9/24/98	42	NOTICE OF APPEAL by defendant United Foods, Inc. from Dist. Court decision order [36-2] - CJT (pb) [Entry date 09/25/98] (1:96cv1252)

* * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE (JACKSON)

No. 98-CV-1082

UNITED FOODS, INC., PLAINTIFF

v.

UNITED STATES AND
DEPARTMENT OF AGRICULTURE, DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
3/23/98	1	COMPLAINT (Summons(es) issued) Receipt #: 19076; Filing fee $150.00 - CJT (gn) [1:98cv1082]
3/27/98	2	MOTION by plaintiff for attorney Bradley A. MacLean to appear pro hac vice w/cert of good standing - CJT wpo (pb) [Entry date 03/30/98] [1:98cv1082]

DATE	DOCKET NUMBER	PROCEEDINGS
3/27/98	3	PRO HAC VICE FEE PAID: in the amount of $ 10.00 receipt # 19095 by Farris, Warfield & Kanaday on behalf of atty Bradley A. MacLean (pb) [Entry date 03/30/98] [1:98cv1082]
3/27/98	4	ORDER by Judge James D. Todd granting motion for attorney Bradley A. MacLean to appear pro hac vice [2-1] - CJT (cc: all counsel; B. Quarles) (pb) [Entry date 03/30/98] [Edit date 03/30/98] [1:98cv1082]
4/17/98	5	ORDER by Judge James D. Todd consolidating cases 96-1252 w/98-1082 - CJT (cc: all counsel) (pb) [Entry date 04/20/98] [1:98cv1082]
4/27/98	6	RETURN OF SERVICE executed upon defendant AGRI on 4/6/98, cert mail (pb) [Entry date 04/29/98] [1:98cv 1082]

DATE	DOCKET NUMBER	PROCEEDINGS
4/27/98	7	RETURN OF SERVICE executed upon defendant USA by Atty Genrl J. Reno on 3/30/98, cert mail (pb) [Entry date 04/29/98] [1:98cv1082]
4/27/98	8	RETURN OF SERVICE executed upon defendant USA by USA/V. Coleman on 3/26/98, cert mail (pb) [Entry date 04/29/98] [1:98cv1082]
5/21/98	26	MOTION by govt dft AGRI (US Dept of Agriculture) in 1:98-cv-01082 to dismiss, or, in the alterntive [sic] , for summary judgment - CJT (pb) [Entry date 05/22/98] [1:96cv 1252 1:98cv1082]

DATE	DOCKET NUMBER	PROCEEDINGS
5/21/98	27	MEMORANDUM by govt dft AGRI (US Dept of Agriculture) in 1:98-cv-01082 in support of motion to dismiss [26-1] in 1:98-cv-01082, of motion for summary judgment [26-2] in 1:98-cv-01082 w/Exhs: 1-2. USDC memorandum opinion/orders; 3. order; 4. program announcement; 5. USDA petition; 6. USDA decision/order of dismissal; 7. USDA decision/order -CJT (pb)[Entry date 05/22/98] [1:96cv 1252 1:98cv 1082]
6/19/98	28	MOTION by defendant United Foods, Inc. in 1:96-cv-01252, plaintiff United Foods, Inc. in 1:98-cv-01082 to extend time to file resp to the govt's motion to dism - CJT wpo (pb) [Entry date 06/22/98] [1:96cv1252 1:98cv1082]

DATE	DOCKET NUMBER	PROCEEDINGS
6/22/98	29	ORDER by Judge James D. Todd granting motion to extend time to file resp to the govt's motion to dism [28-1] in 1:96-cv-01252, 1:98-cv-01082 - CJT (cc: all counsel) (pb) [Entry date 06/23/98] [1:96cv1252 1:98cv1082]
7/28/98	30	ORDER by Judge James D. Todd granting motion for summary judgment [26-2] terminating party AGRI in 1:98-cv-01082, party USA in 1:98-cv-01082 - CJT wpj, OB (cc: all counsel) (pb) [Entry date 07/29/98] [1:98cv1082]
7/31/98	31	JUDGMENT: per order field [sic] 7/28/98 granting motion for summary judgment and judgment entered on behalf of USA by Judge James D. Todd terminating case and terminating case consolidation (cc: all counsel) (skp) [Entry date 08/03/98] [1:98cv1082]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-6436

UNITED FOODS, INC., PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF AGRICULTURE,
DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	PROCEEDINGS
10/28/98	Civil Case Docketed. Notice filed by Appellant United Foods Inc. Transcript needed: n (ac)
10/28/98	BRIEFING LETTER SENT setting briefing schedule: appellant brief due 12/7/98; appellee brief due 1/6/99; reply brief due 1/20/99; appendix due 1/27/99; final briefs due 2/17/99. [98-6436] (ac)
11/12/98	APPEARANCE filed by Attorney Bradley A. MacLean for Appellant United Foods Inc [98-6436](ac)

DATE	PROCEEDINGS
11/12/98	PRE-ARGUMENT STATEMENT filed by Bradley A. MacLean for Appellant United Foods Inc [98-6436] (ac)
11/12/98	APPEARANCE filed by Attorney Tara Looney Swafford for Appellant United Foods Inc [98-6436] (ac)
11/18/98	APPEARANCE filed by Attorney August E. Flentje for Appellees Dept of Agriculture, USA [98-6436] (ac)
11/18/98	APPEARANCE filed by Attorney Barbara C. Biddle for Appellees Dept of Agriculture, USA [98-6436] (ac)
12/10/98	PROOF BRIEF filed by Bradley A. MacLean for Appellant United Foods Inc. Certificate of service date 12/7/98 Number of Pages: 34. [98-6436] (ac)
12/10/98	Request to require oral argument filed by Bradley A. MacLean for Appellant United Foods Inc [98-6436] (ac)
1/11/99	PROOF BRIEF filed by August E. Flentje for Appellees Dept of Agriculture, USA. Certificate of service date 1/6/99. Number of Pages: 98. [98-6436] (ac)

DATE	PROCEEDINGS
1/11/99	Request to waive oral argument and submit case on the briefs, (waiver on page: unnumbered), filed by August E. Flentje for Appellee Dept of Agriculture, Appellee USA [98-6436] (ac)
1/22/99	PROOF REPLY BRIEF filed by Bradley A. MacLean for Appellant United Foods Inc. Certificate of service date 1/20/99 [98-6436] (ac)
2/1/99	APPENDIX filed by Bradley A. MacLean for Appellant United Foods Inc. Copies: 5. Certificate of service date 1/27/99 [98-6436] (ac)
2/18/99	FINAL BRIEF filed by August E. Flentje for Appellees Dept of Agriculture, USA. Copies: 7. Certificate of service date 2/16/99. Number of Pages: 98. [98-6436] (ac)
2/18/99	Request to waive oral argument and submit case on the briefs, (waiver on page: un-numbered), filed by August E. Flentje for Appellees Dept of Agriculture, USA [98-6436] (ac)

DATE	PROCEEDINGS
2/22/99	FINAL BRIEF filed by Bradley A. MacLean for Appellant United Foods Inc. Copies: 7. Certificate of service date 2/17/99 Number of Pages: 60. [98-6436] (ac)
2/22/99	Request to require oral argument filed by Bradley A. MacLean for Appellant United Foods Inc [98-6436] (ac)
2/22/99	FINAL REPLY BRIEF filed by Bradley A. MacLean for Appellant United Foods Inc. Copies: 7 Certificate of service date 2/17/99 Number of Pages: 18. [98-6436] (ac)
7/13/99	Oral argument date set for September 23, 1999 in court room 403. Notice of argument sent to counsel. [98-6436] (rld)
8/16/99	ADDITIONAL CITATION filed by Bradley A. MacLean for Appellant United Foods Inc. Certificate of service date 8/12/99 [98-6436] (yh)
8/30/99	ADDITIONAL CITATION filed by August E. Flentje for Appellees Dept of Agriculture, USA. Certificate of service date [98-6436] (ac)

DATE	PROCEEDINGS
9/23/99	CAUSE ARGUED on 9/23/99 by Bradley A. MacLean for Appellant United Foods Inc, August E. Flentje for Appellee Dept of Agriculture, Appellee USA before Judges Merritt, Clay, Aldrich. [98-6436] (me)
10/1/99	ADDITIONAL CITATION filed by August E. Flentje for Appellees Dept of Agriculture, USA. Certificate of service date none but served. [98-6436] (ac)
10/25/99	Appellant RESPONSE filed to appellees' additional citations. Response from Bradley A. MacLean for Appellant United Foods Inc. Certificate of service date 10/22/99. [98-6436] (mcp)
11/23/99	OPINION filed: REVERSED decision for publication pursuant to local rule 206. [98-6436] Gilbert S. Merritt, Authoring Judge, Eric L. Clay, Circuit Judge, Ann Aldrich, District Judge. (ac)
11/23/99	JUDGMENT: REVERSED. (ac)

DATE	PROCEEDINGS
12/30/99	Appellee MOTION filed to extend time to file petition for rehearing until 1/21/00. Motion filed by August E. Flentje and Barbara C. Biddle for Appellee Dept of Agriculture, Appellee USA. Certificate of service date 12/29/99. [98-6436] (yh)
1/3/00	RULING granting motion to extend time to file petition for rehearing [2075113-1] filed by August E. Flentje, Barbara C. Biddle. Petition to be filed by 1/21/00 for Barbara C. Biddle [98-6436] (yh)
1/20/00	MOTION filed to allow Amer Mushroom Inst, et al to become an amicus curiae in support of appellees' petition for rehearing en banc. Motion filed by John G. Roberts for Amer Mushroom Inst, et al. Certificate of service date 1/19/00. [98-6436] (blh)
1/20/00	TENDERED: brief of amicus curiae in support of appellees' petition for rehearing en banc from John G. Roberts for Amer Mushroom Inst, et al. [98-6436] (blh)

DATE	PROCEEDINGS
1/21/00	PETITION for en banc rehearing filed by August E. Flentje for Appellees Dept of Agriculture, USA. Certificate of service date 1/20/00. [98-6436] (blh)
1/21/00	APPEARANCE filed by Attorney John G. Roberts for Amer Mushroom Inst [98-6436] (blh)
1/27/00	ORDER filed granting motion of The American Mushroom Institute for leave to file a brief in support of appellees' petition for rehearing en banc [2087184-1] filed by John G. Roberts Jr. [98-6436]. Entered by order of the court. (blh)
1/27/00	BRIEF filed by John G. Roberts for Amicus Curiae Amer Mushroom Inst. Copies 25. Certificate of service date 1/19/00 (see certificate attached to motion filed 1/20/00). Number of Pages: 15. [98-6436] (blh)
1/27/00	LETTER SENT by blh to Bradley A. MacLean for Appellant United Foods Inc notifying that party is directed to respond to a petition for en banc rehearing [2087142-1] filed by August E. Flentje and brief of amici curiae filed by John G. Roberts. Response due by 2/10/00. [98-6436]. (blh)

DATE	PROCEEDINGS
2/10/00	Appellant MOTION filed to supplement certified record. Motion filed by Bradley A. MacLean for Appellant United Foods Inc. Certificate of service date 2/9/00 [98-6436] (ac)
2/10/00	RESPONSE to a petition for en banc rehearing [2087142-1] filed by August E. Flentje. Response filed by Bradley A. MacLean for Appellant United Foods Inc. Certificate of service date 2/9/00. [98-6436] (blh)
2/22/00	LETTER SENT by ac to Bradley A. MacLean for Appellant United Foods Inc regarding ruling on motion to supplement record on appeal. [98-6436]. (ac)
2/22/00	Appellee RESPONSE in opposition filed regarding a motion to supplement certified record. Response from August E. Flentje for Appellees. Certificate of service date 2/18/2000. [98-6436] (ac)
3/23/00	ORDER filed denying petition for en banc rehearing [2087142-1] filed by August E. Flentje [98-6436]. Gilbert S. Merritt, Eric L. Clay, Circuit Judges; Ann Aldrich, District Judge. (blh)

DATE	PROCEEDINGS
3/30/00	Appellee MOTION filed to stay mandate. Motion filed by August E. Flentje and Barbara C. Biddle for Appellees Dept of Agriculture, USA. Certificate of service date 3/29/00. [98-6436] (ac)
4/5/00	ORDER filed granting motion to stay mandate until 5/15/2000 filed by August E. Flentje, Barbara C. Biddle. [98-6436] Gilbert S. Merritt, Eric L. Clay, Circuit Judges, Ann Aldrich, District Judge. (ac)
5/8/00	Appellee's 2nd MOTION filed to stay mandate until 6/21/2000. Motion filed by August E. Flentje for Appellees Dept of Agriculture, USA. Certificate of service date 5/5/00. [98-6436] (ac)
5/10/00	ORDER filed denying motion to stay mandate until 6/21/00 pending a decision whether to petition for certiorari filed by August E. Flentje. [98-6436] Gilbert S. Merritt, Eric L. Clay, Circuit Judges, Ann Aldrich, District Judge. (ac)
5/17/00	MANDATE ISSUED with no cost taxed [98-6436] (ac)

* * * * *

UNITED STATES DEPARTMENT OF AGRICULTURE BEFORE THE SECRETARY OF AGRICULTURE

MPRCIA Docket No. 96-0001

IN RE: UNITED FOODS, INC., A DELAWARE CORPORATION, D/B/A PICTSWEET MUSHROOM FARMS, PETITIONER

[Filed: Dec 9, 1997]

DECISION AND ORDER OF DISMISSAL

This proceeding was initiated by a Petition filed by United Foods, Inc., on June 25, 1996, alleging that the Mushroom Promotion Research and Consumer Information Act (7 U.S.C. § 6101 *et seq.*) ("the Act" or "MPRCIA"), and the assessments imposed pursuant to the Act, violate Petitioner's rights guaranteed under the First Amendment of the United States Constitution.

On November 15, 1997, I issued an Order staying this proceeding pending the Supreme Court's resolution of *Glickman v. Wileman* and/or *USDA v. Cal-Almond.* On June 25, 1997, the Court entered its decision in *Glickman v Willeman*, 117 S. Ct. 2130 (1997); and on June 27, 1997, the Court granted certiorari and, vacated the judgment in *USDA v. Cal-Almond Inc.*, and remanded the case to the Ninth Circuit for further consideration is light of *Wileman.* 117 S. Ct. 2501(1997).

On October 21, 1997, Respondent filed a motion to dismiss the Petition in accordance with the *Wileman* decision, which held that the use of mandatory assessments for generic advertising did not abridge freedom of speech within the meaning of the First Amendment. On November 14, 1997, Petitioner filed a written opposition to the motion to dismiss. Petitioner maintains that the holding in *Wileman* is not dispositive of the issues in this proceeding because the MPRCIA is significantly different than the marketing order addressed in *Wileman*, and because *Wileman* did not address the freedom of association claims raised by Petitioner in this instant case.

I disagree with Petitioner. I conclude that *Wileman* is dispositive of the issues herein.

Petitioner contends that the *Wileman* case is distinguishable because the peach and nectarine marketing orders at issue there regulated other aspects of the market, and did not have promotion as their sole purpose as does the MPRCIA. This distinction has twice been rejected by the United States District Court for the Eastern District of California, in cases involving California table grapes and California cut flowers. In *Delano Farms Co. v. California Grape Commission*, the Court held that:

> [*Wileman's*] holding is summarized in the first words of the principal dissent: "The Court today finds no First Amendment right to be free of coerced subsidization of commercial speech . . . ." That principle controls. Plaintiff's argument [that] a different result obtains when a program does not regulate fruit size, color, etc., is unconvincing. Were

> that the case, the state could validate a program merely by adding additional regulatory burdens. Nothing in [*Wileman*] indicates results should differ in "stand alone" advertising programs.

Delano Farms v. California Grape Comm'n, CV-F-96-6053 OWWDLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997).

In *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, the Court, as stated during the hearing, held that:

> Plaintiff is mistaken in arguing that the California Cut Flower industry is to be distinguished from the more heavily regulated peach and nectarine production industry which the *Wileman* case considered. The *Wileman* decision did not turn on the degree to which State or Federal Government has otherwise displaced free market competition. Rather, the Court found that compelled participation in a generic advertising program is itself a form of economic regulation whose efficacy is to be judged by legislatures, Government officials and producers, and not by the Court under its free speech jurisdiction.

Matsui Nursery, Inc., Civ No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 6, 1997).

Furthermore, in *In re Donald B. Mills, Inc.*, 56 Agric. Dec. ___ (Aug. 27, 1997), the Judicial Officer held that *Wileman* did extend to the MPRCIA, and that it did preclude the petitioner's First Amendment claims with respect to manadatory assessments for generic advertising. *Mills, supra* at 44-48.

Petitioner also argues that the Supreme Court, in *Wileman*, did not sufficiently address the freedom of association issue for the Court's Decision to be binding on that issue. This argument was also rejected in *Delano Farms*, which held that:

> *[Wileman]* was decided on "First Amendment" grounds and addressed association under a federal marketing order. There is no distinction between speech and association in the "ideologically neutral" context of a generic advertising program.

Delano Farms, *supra* at 11.

The Judicial Officer also held that neither freedom of association nor freedom of speech are infringed by the MPRCIA. He held:

> [T]he requirement under the MPRCIA and the Mushroom Order that Petitioner fund the promotion of fresh mushrooms does not violate Petitioner's rights to freedom of association and speech under the First Amendment to the Constitution of the United States, and Petitioner's rights under the First Amendment are not even implicated by the MPRCIA or the Mushroom Order.

Mills, *supra* at 48.

Accordingly, the Petition must be dismissed.

ORDER

The Petition is dismissed with prejudice.

This Decision and Order of Dismissal shall become final and effective 35 days after its service upon Peti-

tioner unless within 30 days of its service, Petitioner files an appeal pursuant to 7 C.F.R § 900.65.

/s/ EDWIN S. BERNSTEIN
EDWIN S. BERNSTEIN
Administrative Law Judge

December 9, 1997

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

MPRCIA Docket No. 96-0001

IN RE: UNITED FOODS, INC.,
A DELAWARE CORPORATION, D/B/A
PICTSWEET MUSHROOM FARMS, PETITIONER

[Filed: Mar. 4, 1998]

DECISION AND ORDER

I. INTRODUCTION

United Foods, Inc., a Delaware corporation, d/b/a Pictsweet Mushroom Farms [hereinafter Petitioner], instituted this proceeding on June 25, 1996, under the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended (7 U.S.C. §§ 6101-6112) [hereinafter the MPRCIA]; the Mushroom Promotion, Research, and Consumer Information Order (7 C.F.R. §§ 1209.1-.77) [hereinafter the Mushroom Order]; the Rules and Regulations (7 C.F.R. §§ 1209.200-.280) [hereinafter the Mushroom Regulations]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Education Programs (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52) [hereinafter the Rules of Practice], by filing a Petition pursuant to 7 U.S.C. § 6106.

Petitioner alleges that the MPRCIA and assessments pursuant to the MPRCIA violate Petitioner's rights to

freedom of association and freedom of speech guaranteed under the First Amendment of the Constitution of the United States (Pet. ¶ 23). Petitioner seeks an exemption from assessments imposed in connection with the Mushroom Order and a refund of any past paid assessments under the Mushroom Order (Pet. ¶ 23).

On July 25, 1996, the Administrator of the Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed Answer of Respondent [hereinafter Answer] stating: (1) the Petition fails to state a claim upon which relief can be granted (Answer at 4); and (2) the MPRCIA, the Mushroom Order, and the Mushroom Regulations, as interpreted by Respondent and the Mushroom Council, are constitutional and otherwise fully in accordance with law (Answer at 4).

On November 15, 1996, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] stayed the hearing in this proceeding pending action by the Supreme Court of the United States in *Cal-Almond, Inc. v. Department of Agric.*, 14 F.3d 429 (9th Cir. 1993), 67 F.3d 874 (9th Cir. 1995), *petition for cert. filed*, 65 U.S.L.W. 3052 (U.S. May 20, 1996) (No. 95-1879), and *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995), *cert. granted sub nom. Glickman v. Wileman Bros. & Elliott, Inc.*, 116 S. Ct. 1875 (1996), based on the ALJ's expectation that the Supreme Court of the United States would issue guidance in *Wileman Bros.* or *Cal-Almond*, or both *Wileman Bros.* and *Cal-Almond*, which might resolve the issue of Petitioner's First Amendment challenge in this proceeding (Summary of Teleconference—Stay Order, filed November 15, 1996).

On June 25, 1997, the Supreme Court of the United States entered its decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), holding that compelled funding of generic advertising of California nectarines, plums, and peaches in accordance with Marketing Order 916 (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt. 917), both of which are issued under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter AMAA], neither abridge First Amendment rights nor implicate the First Amendment. Moreover, on June 27, 1997, the Supreme Court of the United States granted the petition for a writ of certiorari in *Cal-Almond*, vacated the judgment of the United States Court of Appeals for the Ninth Circuit, and remanded the case to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997). On September 4, 1997, the United States Court of Appeals for the Ninth Circuit remanded *Cal-Almond* "to the district court with instruction to dismiss Cal-Almond's First Amendment claim."

On October 21, 1997, Respondent, relying on, *inter alia*, *Wileman Bros.*, filed a motion to dismiss Petitioner's Petition (Respondent's Motion to Dismiss), and on November 14, 1997, Petitioner filed Petitioner's Opposition to Respondent's Motion to Dismiss. On December 9, 1997, the ALJ issued Decision and Order of Dismissal [hereinafter Initial Decision and Order] in which the ALJ concluded that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), is dispositive of the issues in this proceeding and dismissed the Petition with prejudice.

On January 14, 1998, Petitioner appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35)[1]; on February 17, 1998, Respondent filed Respondent's Response to Petitioner's Appeal to the Judicial Officer; and on February 18, 1998, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I agree with the ALJ's conclusion that *Glickman v. Wileman Bros. & Elliott, Inc., supra,* is dispositive of the First Amendment issue in this proceeding and that Petitioner's Petition should be dismissed with prejudice. Therefore, I have adopted the ALJ's Initial Decision and Order as the final decision and order. Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's Initial Decision and Order.

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[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

II. APPLICABLE CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

[omitted]

III. ALJ'S DECISION AND ORDER OF DISMISSAL (AS MODIFIED)

. . . .

Petitioner contends that [*Glickman v. Wileman Bros. & Elliott, Inc., supra,*] is distinguishable [from the facts in this proceeding] because the marketing orders at issue [in *Wileman Bros.*] regulate . . . aspects of the market [that are not regulated under] the MPRCIA. This distinction has twice been rejected by the United States District Court for the Eastern District of California, in cases involving California table grapes and California cut flowers. In *Delano Farms Co. v. California Table Grape Commission*, the court held that:

> [*Wileman's*] holding is summarized in the first words of the principal dissent: "The Court today finds no First Amendment right to be free of coerced subsidization of commercial speech . . . ." That principle controls. Plaintiff's argument [that] a different result obtains when a program does not regulate fruit size, color, etc. is unconvincing. Were that the case, the state could validate a program merely by adding additional regulatory burdens. Nothing in [*Wileman Bros.*] indicates results should differ in "stand alone" advertising programs.

Delano Farms Co. v. California Table Grape Comm'n, CV-F-96-6053 OWW DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997).

In *Matsui Nursery, Inc. v. California Cut Flower Commission*, the court, as stated during the hearing, held that:

> Plaintiff is mistaken in arguing that the California Cut Flower industry is to be distinguished from the more heavily regulated peach and nectarine production industry which the *Wileman* case considered. The *Wileman* decision did not turn on the degree to which State or Federal Government has otherwise displaced free market competition. Rather, the Court found that compelled participation in a generic advertising program is itself a form of economic regulation whose efficacy is to be judged by legislatures, Government officials and producers, and not by the Court under its free speech jurisdiction.

Matsui Nursery, Inc. v. California Cut Flower Comm'n, Civ No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997) (Reporter's Transcript).

Furthermore, in *In re Donald B. Mills*, Inc., 56 Agric. Dec. ___ (Aug. 27, 1997), *appeal docketed*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Sept. 17, 1997), the Judicial Officer held that *Wileman Bros.* did extend to the MPRCIA, and that it did preclude the petitioner's First Amendment claims with respect to mandatory assessments for generic advertising. *In re Donald B. Mills, Inc. supra*, slip op. at 4[3]-48.

Petitioner also argues that the Supreme Court of the United States, in *Wileman Bros.*, did not sufficiently address the freedom of association issue for the Court's decision to be binding on that issue. This argument was also rejected in *Delano Farms*, which held that:

> [*Wileman Bros.*] was decided on "First Amendment" grounds and addressed association under a federal marketing order. There is no distinction between speech and association in the "ideologically neutral" context of a generic advertising program.

Delano Farms Co. v. California Table Grape Comm'n, *supra*, slip op. at 11.

The Judicial Officer also held that neither freedom of association nor freedom of speech are infringed by the MPRCIA. He held:

> [T]he requirement under the MPRCIA and the Mushroom Order that Petitioner fund the promotion of fresh mushrooms does not violate Petitioner's rights to freedom of association and speech under the First Amendment to the Constitution of the United States, and Petitioner's rights under the First Amendment are not even implicated by the MPRCIA or the Mushroom Order.

In re Donald B. Mills, Inc., *supra*, slip op. at 48.

IV. ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises four issues in Petitioner's Appeal to the Secretary [hereinafter Petitioner's Appeal Petition].

A. Motion to Dismiss

First, Petitioner contends:

> . . . [A]ll of the facts in the Complaint must be construed in the light most favorable to the Petitioner, consistent with Federal Rules of Civil Procedure Rule 12(c) or Rule 12(b)(6) with respect to motions to dismiss complaints. The dismissal occurred in this case without the benefit of a hearing. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Petitioner's Appeal Petition at 3.

Petitioner's reliance on Rule 12(b)(6) and Rule 12(c) of the Federal Rules of Civil Procedure is misplaced. Rule 1 of the Federal Rules of Civil Procedure provides that the Federal Rules of Civil Procedure govern procedure in the United States district courts, as follows:

> **Rule 1. Scope and Purpose of Rules**
>
> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Fed. R. Civ. P. 1.

The Federal Rules of Civil Procedure are not applicable to administrative proceedings which are conducted before the Secretary of Agriculture, under the MPRCIA, and in accordance with the Rules of Practice (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52).[2]

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[2] See generally, *Morrow v. Department of Agric.*, 65 F.3d 168 (Table) (per curiam) 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (1995) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. ___, slip op. at 12 (Feb. 20, 1998) (Order Denying Pet. for Recons.) (stating that the Federal Rules of Civil Procedure are not applicable to Department proceedings conducted before the Secretary of Agriculture, under the Agricultural Marketing Agreement Act of 1937, as amended, and in accordance with the Rules of Practice Governing Proceedings To Modify or To Be Exempted From Marketing Orders); *In re Dean Byard*, 56 Agric. Dec. ___, slip op. at 21 (Aug. 8, 1997) (stating that while respondent's reference to the "standard" Rules of Civil Procedure is unclear, no rules of civil procedure govern a proceeding instituted under the Horse Protection Act of 1970, as amended, and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re Far West Meats*, 55 Agric. Dec. 1045, 1055-56 (1996) (Clarification of Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to Department proceedings conducted under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re Far West Meats*, 55 Agric. Dec. 1033, 1039-40 (1996) (Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to Department proceedings conducted under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1096-99 (1994) (stating the Federal Rules of Civil Procedure

However, I agree with Petitioner's general point that, when considering a motion to dismiss filed in accordance with the Rules of Practice, allegations of material fact in a petition must be construed in the light most favorable to a petitioner.[3] However, even if the allegations of material fact in the Petition are construed in the light most favorable to Petitioner, I find that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), is dispositive of Petitioner's First Amendment claims and that the Petition fails to state a claim upon which relief can be granted. Therefore, I agree with the ALJ's Initial Decision and Order in which he granted Respondent's Motion to Dismiss and dismissed Petitioner's Petition with prejudice.

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are not applicable to the Department's disciplinary proceedings conducted in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Shasta Livestock Auction Yard, Inc.*, 48 Agric. Dec. 491, 504 n.5 (1989) (holding the Federal Rules of Civil Procedure are not followed in proceedings before the Department of Agriculture).

[3] *In re Midway Farms, Inc.*, 56 Agric. Dec. 102, 113-14 (1997) (stating that allegations of material fact in a petition must be construed in the light most favorable to a petitioner claiming handler status when considering a motion to dismiss filed pursuant to 7 C.F.R. § 900.52(c)); *In re Asakawa Farms, Inc.*, 50 Agric. Dec. 1144, 1149 (1991) (stating that allegations of material fact in a petition must be construed in the light most favorable to a petitioner claiming handler status when considering a motion to dismiss for want of standing filed pursuant to 7 C.F.R. § 900.52(c)), *dismissed*, No. CV-F-91-686-OWW (E.D. Cal. Sept. 28, 1993).

B. First Amendment

1. Freedom of Speech

Second, Petitioner contends that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), and *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997), are not dispositive of Petitioner's First Amendment challenges to compelled assessments to fund the generic promotion program under the MPRCIA (Petitioner's Appeal Petition at 3-7).

The Supreme Court of the United States held in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), that compelled funding of generic advertising of California nectarines, plums, and peaches in accordance with Marketing Order 916 (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt. 917), both of which are issued under the AMAA, neither abridge First Amendment rights nor implicate the First Amendment.

As Petitioner correctly notes (Petitioner's Appeal Petition at 4), the Court in *Wileman Bros.* stressed the importance of the statutory context in which the First Amendment issue arises. However, the Court did not limit its holding to marketing orders issued under the AMAA. Instead, the Court held that three characteristics of the regulatory scheme at issue in *Wileman Bros.* distinguish it from laws that the Court found to abridge the freedom of speech protected by the First Amendment, as follows: (1) the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience; (2) the marketing orders do not compel any person to engage in any actual or symbolic speech; and (3) the marketing orders

do not compel producers to endorse or finance any political or ideological views.

An examination of the MPRCIA, the Mushroom Order, and the Mushroom Regulations reveals that the MPRCIA, the Mushroom Order, and the Mushroom Regulations have the very same three characteristics which the Court found dispositive of the First Amendment issue in *Glickman v. Wileman Bros. & Elliott, Inc., supra.*[4] First, Petitioner is not prohibited or restrained by the MPRCIA, the Mushroom Order, the Mushroom Regulations, or the Mushroom Council from promoting or advertising its brand of mushrooms or from communicating any other message to any audience. Section 501(b)(4)-(5) of the Federal Agriculture Improvement and Reform Act of 1996 specifically provides that neither the MPRCIA, the Mushroom Order, nor the Mushroom Regulations prohibits or restricts any individual advertising or promotion or replaces the individual advertising or promotion efforts of producers or processors (110 Stat. 1030). This factor distinguishes the MPRCIA, the Mushroom Order, and the Mushroom Regulations from cases in which the Supreme Court has found that restrictions on commercial speech violate the right to freedom of speech.[5]

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[4] *In re Donald B. Mills, Inc.*, 56 Agric. Dec. ___, slip op. at 43-44 (Aug. 27, 1997), *appeal docketed*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Sept. 17, 1997).

[5] *See 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996) (holding that a state statute which bans price advertising for alcoholic beverages abridges speech in violation of the First Amendment as made applicable to the states by the Fourteenth Amendment); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (holding that a New York Public Service Commission ban on advertising by an electric utility to

While the requirement that Petitioner fund generic advertising may reduce the amount of money available to Petitioner to conduct its own advertising or communicate other messages, this incidental effect of the MPRCIA, the Mushroom Order, and the Mushroom Regulations does not amount to a restriction on speech.[6]

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promote the use of electricity violates the First and Fourteenth Amendments); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding that a state statute which bans the advertising of prescription drug prices violates the First and Fourteenth Amendments).

[6] *In re Donald B. Mills, Inc.*, 56 Agric. Dec. ___, slip op. at 45 (Aug. 27, 1997), *appeal docketed*, No. CIV F-97- 5890 OWW SMS (E.D. Cal. Sept. 17, 1997) (stating that while the requirement that petitioner fund generic advertising may reduce the amount of money available to petitioner to conduct its own advertising or communicate other messages, this incidental effect of the MPRCIA and the Mushroom Order does not amount to a restriction on speech). *See also Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2138-39 (1997) (stating that the First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget and the fact that an economic regulation may indirectly lead to a reduction in an individual advertising budget does not itself amount to a restriction on speech); *In re Cal-Almond, Inc.*, 56 Agric. Dec. ___, slip op. at 86-87 (Dec. 24, 1997) (stating that while the requirement that petitioners fund generic advertising may reduce the amount of money available to petitioners to conduct their own advertising or communicate other messages, this incidental effect of the AMAA and the Almond Order does not amount to a restriction on speech); *In re Jerry Goetz*, 56 Agric. Dec. ___, slip op. at 33 (Nov. 3, 1997) (stating that even if the requirements of the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911), the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101-.217), and the Rules and Regulations (7 C.F.R. §§ 1260.301-.316) did reduce resources available to respondent to engage in his own speech, this incidental effect would not amount to a restriction on speech).

Second, Petitioner is not compelled to speak by either the MPRCIA, the Mushroom Order, or the Mushroom Regulations. This fact distinguishes the MPRCIA, the Mushroom Order, and the Mushroom Regulations from cases in which the Supreme Court has found that compelled speech violates the right to freedom of speech or association.[7] While Petitioner is compelled under the MPRCIA, the Mushroom Order, and the Mushroom Regulations to fund promotion of mushrooms, this requirement is not a requirement that Petitioner speak. Petitioner is not publicly identified or publicly associated with the Mushroom Council's promotion program, and Petitioner is not required to respond to the Mushroom Council's promotion program.[8]

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[7] *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that requiring private citizens who organize a parade to include a group which imparts a message that organizers do not wish to convey violates the First Amendment); *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988) (holding that a state statute requiring professional fund raisers to disclose to potential donors the percentage of charitable contributions collected that were turned over to the charity mandates speech in violation of the First Amendment); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a state statute requiring an individual to display an ideological message on his or her private property violates the First Amendment); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that action of a state making it compulsory for children in public schools to salute the flag and pledge allegiance to the flag and the republic for which the flag stands violates the First and Fourteenth Amendments).

[8] *In re Donald B. Mills, Inc.*, 56 Agric. Dec. ___, slip op. at 46 (Aug. 27, 1997), *appeal docketed*, No. CIV F-97- 5890 OWW SMS (E.D. Cal. Sept. 17, 1997).

Finally, on the issue of freedom of speech, the Mushroom Council's mushroom promotion program has no political or ideological content, and Petitioner is not compelled by the MPRCIA, the Mushroom Order, or the Mushroom Regulations to endorse or finance any political or ideological views. Section 501(b)(8)(B) of the Federal Agriculture Improvement and Reform Act of 1996 specifically provides that the MPRCIA establishes a program to produce "nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding . . . markets . . ." (110 Stat. 1031). This fact distinguishes the MPRCIA, the Mushroom Order, and the Mushroom Regulations from cases in which the Supreme Court has found that required financing of political or ideological speech violates the right to freedom of speech.[9]

I find that *Glickman v. Wileman Bros. & Elliott, Inc., supra*, is dispositive of the First Amendment issue in this proceeding. The differences between the regulatory scheme in the marketing orders at issue in *Wileman Bros.* and the regulatory scheme at issue in this

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[9] *See Keller v. State Bar of California*, 496 U.S. 1 (1990) (holding that a state bar's use of compulsory dues paid by attorneys to finance political or ideological activities with which the attorneys disagree violates the attorneys' First Amendment right of free speech when such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (holding that a union's use of compulsory service charges paid by public school teachers to finance ideological causes with which the teachers disagree violates the teachers' First Amendment right to freedom of speech when such expenditures are not germane to the union's duties as a collective bargaining representative).

proceeding are not relevant to Petitioner's First Amendment challenge to the MPRCIA and the assessments imposed pursuant to the MPRCIA. Thus, the requirement under the MPRCIA, the Mushroom Order, and the Mushroom Regulations that Petitioner fund the promotion of fresh mushrooms does not violate Petitioner's right to freedom of speech under the First Amendment to the Constitution of the United States, and Petitioner's rights under the First Amendment are not even implicated by the MPRCIA, the Mushroom Order, or the Mushroom Regulations.[10]

2. Freedom of Association

Third, Petitioner contends that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), does not dispose of Petitioner's claim that the MPRCIA and the assessments imposed pursuant to the MPRCIA violate Petitioner's right to freedom of association guaranteed under the First Amendment of the Constitution of the United States (Petitioner's Appeal Petition at 7-11).

I disagree with Petitioner. The Court in *Wileman Bros.* addresses freedom of association stating that, in contrast to compelled contributions for collective bargaining where an employee may have ideological, moral, or religious objections to the union's activities, "the collective programs authorized by the marketing order do not, as a general matter, impinge on speech or association rights." *Glickman v. Wileman Bros. & Elliott, Inc., supra*, 117 S. Ct. at 2140 n.16. The United

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[10] *In re Donald B. Mills, Inc.*, 56 Agric. Dec. ___, slip op. at 48 (Aug. 27, 1997), *appeal docketed*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Sept. 17, 1997).

States District Court for the Eastern District of California, examining the constitutionality of a law permitting the California Table Grape Commission to assess shipped grapes to fund generic advertising of California table grapes, states "[t]he predicate of [*Wileman Bros.*] is that there is no First Amendment right of association *not* to be compelled to associate for generic advertising" and that "no compelling purpose is needed . . . to require commercial association." *Delano Farms Co. v. California Table Grape Comm'n*, *supra*, slip op. at 11 (emphasis in original).

Moreover, I have previously held, based on *Wileman Bros.*, that freedom of association is not infringed by compelled funding of the generic promotion program under the MPRCIA and the Mushroom Order, as follows:

> [T]he requirement under the MPRCIA and the Mushroom Order that Petitioner fund the promotion of fresh mushrooms does not violate Petitioner's right [] to freedom of association . . . under the First Amendment to the Constitution of the United States, and Petitioner's rights under the First Amendment are not even implicated by the MPRCIA or the Mushroom Order.

In re Donald B. Mills, Inc., *supra*, slip op. at 48.

C. Amendment of Petition

Fourth, Petitioner contends that the ALJ erred by not allowing Petitioner to amend its Petition, as follows:

> . . . In Petitioner's Opposition to the Respondent's Motion to Dismiss, at page 11 of that document, United Foods alleged that when it filed its Com-

> plaint, it was consistent with the *Ninth Circuit* decisions in *Wileman* and *Cal-Almond.* It was claimed that the U.S. Supreme Court had announced a new "test". Petitioners [sic] sought in that brief to be allowed to amend its Petition to allege factual allegations in light of the Supreme Court *Wileman* case. The ALJ never addressed the issue. Therefore, the ALJ's decision should be reversed, and United Foods should be given the opportunity to amend its Complaint in light of the *Wileman* decision. There would be no prejudice to the Respondent.

Petitioner's Appeal Petition at 11 (emphasis in original).

Petitioner states in Petitioner's Opposition to Respondent's Motion to Dismiss, filed November 14, 1997, that Petitioner should be entitled to amend its Petition, as follows:

> When Petitioner filed this complaint, it filed it consistent with the Ninth Circuit decisions in *Wileman* and *Cal-Almond.* The U.S. Supreme Court has now announced a new "test". Petitioner should be entitled to amend its petition to allege factual allegations in light of *Wileman.* The rules of practice allow amending petitions. There would be no prejudice to the Respondent.

Petitioner's Opposition to Respondent's Motion to Dismiss at 11.

Section 900.52b of the Rules of Practice (7 C.F.R. § 900.52b) provides for the amendment of pleadings, as follows:

> **§ 900.52b Amended pleadings.**
>
> At any time before the close of the hearing the petition or answer may be amended, but the hearing shall, at the request of the adverse party, be adjourned or recessed for such reasonable time as the judge may determine to be necessary to protect the interests of the parties. Amendments subsequent to the first amendment or subsequent to the filing of an answer may be made only with leave of the judge or with the written consent of the adverse party.

7 C.F.R. § 900.52b.

Further, section 900.59(a)(2) provides that the judge is authorized to rule on all motions and requests, as follows:

> **§ 900.59 Motions and requests.**
>
> (a) *General.* . . .
>
> (2) The judge is authorized to rule upon all motions and requests filed or made prior to the transmittal by the hearing clerk to the Secretary of the record as provided in this subpart. . . .

7 C.F.R. § 900.59(a)(2).

However, Petitioner's statement (that "Petitioner should be entitled to amend its petition to allege factual allegations in light of *Wileman*") in Petitioner's Opposi-

tion to Respondent's Motion to Dismiss is in the form of a statement, rather than an application or request for a ruling, and I do not find that Petitioner's statement is a motion.[11] While the formalities of court practice do not

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[11] Black's Law Dictionary 1013 (6th ed. 1990) defines the word *motion* as follows:

> **Motion.** . . .
>
> An application made to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant. . . .

See generally *United States v. Brick*, 905 F.2d 1092, 1098-99 (7th Cir. 1990) (concluding that statements made by the government to the court, including the statement that defendant's cooperation should be considered, do not satisfy the motion requirement under section 5K1.1 of the Sentencing Guidelines); *United States v. Coleman*, 895 F.2d 501, 505 (8th Cir. 1990) (stating that letters from the government informing the court of defendant's cooperation, although the functional equivalent of a motion, do not satisfy the motion requirement of 18 U.S.C. § 3553(e)); *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982) (stating that St. Paul's "Objections to Proposed Order" is technically not a motion because it is in the form of a statement rather than an application or request for an order and does not set forth the relief or order sought); *In re Marriage of Houtchens*, 592 P.2d 158, 161 (Mont. 1979) (stating that in construing the civil rule on form motions, this court has frequently stated that a motion is an application for an order); *State ex rel. Gage v. District Court of the Second Judicial District*, 419 P.2d 746, 748 (Mont. 1966) (stating that a motion is an application for an order); *State v. Wise*, 419 P.2d 342, 344 (Ariz. 1966) (stating that the purpose of a motion is to obtain a ruling or an order directing that some act be done in favor of the applicant, and it should call to the attention of the court the particular purpose sought to be achieved, so that the court be given an opportunity to rule on the matter); *Williams v. Denning*, 133 S.E.2d 150, 151 (N.C. 1963) (per curiam) (stating that, under G.S. § 1-578, a motion is an application for an order); *State v. James*, 347 S.W.2d 211, 216 (Mo. 1961) (stating that a motion is an application made to a court or judge for the purpose

of obtaining a ruling or order directing some act be done in favor of the applicant); *McClinton v. Rice*, 265 P.2d 425, 428 (Ariz. 1953) (stating that the purpose of a motion is to obtain a ruling or an order directing that some act be done in favor of the applicant, and the essentials of a motion are that the attention of the court must be called to the particular matter or request, and that the court be given an opportunity to rule as to the matter); *State ex rel. McVay v. District Court of Fourth Judicial District*, 251 P.2d 840, 845 (Mont. 1952) (stating that, under R.C.M. 1947, s 93-8401, a motion is an application for an order); *Iveson v. Second Judicial District Court*, 206 P.2d 755, 759 (Nev. 1949) (stating that a motion is a proceeding directed to a court's authority to act on a given subject; a motion is an application for an order); *People v. Hornaday*, 81 N.E.2d 168, 170 (Ill. 1948) (stating that a motion is an application to the court); *Paramount Publix Corp. v. Boucher*, 19 P.2d 223, 225 (Mont. 1933) (stating that a motion is merely "an application for an order" (section 9772, Rev. Codes 1921)); *Brown v. Caldwell*, 16 P.2d 139, 141 (Cal. 1932) (concluding that a statement of respondent's counsel that he intended to ask for an instructed verdict was not a motion for an instructed verdict; a motion is an application for an order (section 1003, Code of Civil Procedure), and counsel's statement of what he intended to do was not an application for an order); *People v. Brickey*, 178 N.E. 483, 484 (Ill. 1931) (stating that a motion is an application to the court); *Harris v. Chicago House-Wrecking Co.*, 145 N.E. 666, 669 (Ill. 1924) (stating that a motion is an application made to a court for a rule or order); *Genardini v. Kline*, 190 P. 568, 570 (Ariz. 1920) (stating that a motion is an application made to a judge or the court for the purpose of obtaining a rule or order directing some act to be done in favor of the applicant); *State v. Warner Valley Stock Co.*, 137 P. 746, 747 (Or. 1914) (stating that in legal proceedings a motion is an application by a party to an action or suit for some kind of relief, that a motion should state what relief the mover desires and the reasons or grounds for asking for the relief, and that it is the duty of the party who asks for relief by motion to point out specifically what he desires); *Hammer v. Campbell Automatic Safety Gas Burner Co.*, 144 P. 396, 398 (Or. 1914) (stating that a motion is an application to the court for relief of some kind and it should state what relief is desired, and usually, it should state the grounds for asking for the

apply to motions filed in administrative proceedings, parties in administrative proceedings have an obligation to identify and frame applications or requests for rulings so that they are recognizable as such by administrative law judges. Petitioner's statement in Petitioner's Opposition to Respondent's Motion to Dismiss is neither identified nor framed as an application for a ruling. I do not find that the ALJ erred by failing to exercise his authority under section 900.59(a)(2) of the Rules of Practice (7 C.F.R. § 900.59(a)(2)) to rule on Petitioner's putative motion for leave to amend its Petition, which putative motion is in the form of a statement rather than an application or request for a ruling.

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relief demanded); *Taylor v. Woodbury*, 120 P. 367 (Kan. 1912) (stating that under Kansas civil code a motion is defined as an application for an order addressed to the court or a judge in vacation); *Brownell v. Superior Court of Yolo County*, 109 P. 91, 94 (Cal. 1910) (stating that a motion is an application for an order); *Arnold v. Regan*, 69 A. 292 (R.I. 1908) (per curiam) (stating that a motion is a request to the court to grant the mover some right to which he claims); *Williams v. Hawley*, 77 P. 762, 763 (Cal. 1904) (stating that a motion is an application for an order); *Reid v. Fillmore*, 73 P. 849, 850 (Wyo. 1903) (stating, by our Code of Civil Procedure, a motion is defined to be "an application for an order addressed to a court or judge by a party to a suit or proceeding, or one interested therein"); *McGuire v. Drew*, 23 P. 312, 314 (Cal. 1890) (stating that, under section 1003 of the Code of Civil Procedure, an application for an order is a motion).

For the foregoing reasons, the following Order should be issued.

V. Order

The relief requested by Petitioner is denied and the Petition is dismissed with prejudice.

Done at Washington, D.C.

March 4, 1998

/s/ WILLIAM G. JENSON
WILLIAM G. JENSON
Judicial Officer

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

Civil Action No. 1-96-1252

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED FOODS, INC., DEFENDANT

COMPLAINT

The United States of America brings this civil action under the provision of the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended (hereinafter referred to as "the Act"), 7 U.S.C. 6107(a), vesting the several District Courts of the United States with jurisdiction specifically to enforce, and to prevent and restrain any person from violating, any order or regulation issued by the Secretary of Agriculture under the authority contained in the Act, and alleges as follows:

1. Jurisdiction is conferred on this Court by 7 U.S.C. 6107(a)

2. Venue lies in this Court pursuant to 28 U.S.C. § 1391 (b) and (c), inasmuch as the defendant resides and has its offices and principal place of business in this judicial district.

3. The plaintiff is the United States of America, initiating this action as authorized under 7 U.S.C. 6107.

4. The defendant United Foods, Inc., is a corporation organized and existing under the laws of the State of Delaware, and doing business as Pictsweet Mushroom Farms. Its offices and principal place of business are located at 10 Pictsweet Drive, Bells, Tennessee 38006-0119, within the Western District of Tennessee.

5. This action is brought to enforce the provisions of the Act and the Mushroom Promotion, Research, and Consumer Information Order (hereinafter "the Order"), 7 C.F.R. 1209.1-1209.77, and the regulations thereunder, 7 C.F.R. 1209.200-1209.280, issued pursuant to the provisions of the Act.

6. The Order and regulations are administered by the Mushroom Council, which is composed of mushroom producers and importers appointed by the Secretary of Agriculture, and whose function is to conduct the day to day operations set forth in the Act, Order and regulations. 7 U.S.C. 6102(3), 6104(b) and 7 C.F.R. 1209.4, 1209.30-.35 (establishing the Mushroom Council); 7 U.S.C. 6104(c)-(f), 7 C.F.R. 1209.38-.50 (powers and duties of the Mushroom Council).

7. As part of its duties, the Mushroom Council develops, recommends to the Secretary of Agriculture for approval, and administers projects for mushroom promotion, research, consumer information and industry information. 7 U.S.C. 6104(c)(4), 6101 (b); 7 C.F.R. 1209.38 (a), (b), (c), (j), 1209.39 (b), (1), 1209.40.

8. Funds for both these projects and the administrative expenses of the Mushroom Council are generated by levying assessments on producers and importers of mushrooms based on the poundage of mushrooms marketed for fresh use in the United States. 7 U.S.C. 6101(b), 6104(g)(1), (3) and 7 C.F.R. 1209.50(b), 1209.51. First handlers of domestically produced mushrooms are required to collect and remit the assessments levied on their producers and levied on their own production. 7 U.S.C. 6102 (5), 6104 (g) (1), (3); 7 C.F.R. 1209.51(a), (c), 1209.251 (a), (b) .

9. Pursuant to 7 U.S.C. 6104 and 7 C.F.R. 1209.50(a) (1), the Mushroom Council annually recommends to the Secretary of Agriculture a budget for its projects and administrative expenses and a proposed rate of assessment to fund that budget.

10. After approval by the Secretary of Agriculture, and in accord with the limits in 7 U.S.C. 6104(g)(2), an assessment rate of $.0045 per pound was duly adopted for mushrooms produced or imported after February 1, 1996.

11. Pursuant to the Act, Order, and regulations, first handlers, including marketing producers, are also required to file monthly reports detailing, *inter alia*, the number of pounds of assessable mushrooms and the amount of assessments remitted. 7 U.S.C. 6104(i)(1); 7 C.F.R. 1209.60, 1209.260.

12. At least since the inception of reporting and assessment collection under the Act and Order on August 1, 1993, defendant United Foods, Inc., doing business as Pictsweet Mushroom Farms, has been and

is a producer and first handler of mushrooms subject to assessments and monthly reporting under the Act, Order and regulations.

13. Defendant United Foods, Inc., has not filed monthly reports or remitted assessments due for May and June 1996, and has advised the Mushroom Council that it does not intend to file any further reports or remit assessments. Based on the average of its unaudited first handler reports for the previous twelve months, it is estimated that the amount of assessments due is at least $8,000 per month, exclusive of interest.

14. Defendant United Foods, Inc., is violating the Act, Order, and regulations by failing and refusing to file first handler reports and pay assessments when due and will continue to do so until appropriate relief is granted pursuant to 7 U.S.C. 6107(a).

15. Defendant's failure to file first handler reports and pay its assessments has caused and will cause injury and irreparable harm to the operation of the Order and is detrimental to the public interest. Defendant's violations of the Act and the Order threaten the entire scheme of the Order, by causing unfairness to those producers and first handlers who are in compliance with the order and by encouraging wider noncompliance with that Order.

WHEREFORE, the United States respectfully requests that this Court:

1. Issue both temporary and permanent mandatory injunctions commanding the defendant, its officers, agents, employees, successors, assigns and all other

persons in concert or participation with it to comply fully with the Act and all provisions of the Order and the regulations thereunder, now in effect and as they subsequently may be amended, and particularly to:

(a) File forthwith with the Mushroom Council all first handler reports now due;

(b) Pay forthwith to the Mushroom Council all assessment obligations now due, including late payment charges and interest thereon pursuant to 7 C.F.R. 1209.51(g) and 1209.251 (e), (f); and

(c) File with the Mushroom Council all future first handler reports and pay to the Mushroom Council all future assessment obligations when due, including those which accrue during the pendency of this action, pursuant to the provisions of the Act, the Order, and the regulations issued thereunder.

2. Issue both temporary and permanent mandatory injunctions preventing and restraining the defendant, its officers, agents, employees, successors, assigns and all other persons in concert or participation with it from violating the Act and all provisions of the Order and the regulations thereunder now in effect and as they subsequently may be amended.

3. Retain jurisdiction of this action for the purposes of entering such other, further and different orders and judgments as may be necessary in order to give full relief herein.

4. Grant plaintiff its cost of this action.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

CIVIL ACTION NO. 1-98-1082

UNITED FOODS, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, THE UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT

[Filed: Mar 23, 1998]

COMPLAINT FOR REVIEW OF AGENCY ACTION AND FOR DECLARATORY RELIEF

United Foods, Inc. ("United Foods"), for its Complaint against the United States of America, The United States Department of Agriculture (the "U.S.D.A."), states as follows:

PARTIES

1. United Foods is a corporation organized and existing under the laws of the State of Delaware. Since 1987, United Foods has been and is a producer and first handler of mushrooms doing business as Pictsweet Mushroom Farms. United Foods' offices and principal place of business are located in Bells, Tennessee, within the Western District of Tennessee.

2. The U.S.D.A. is the agency in charge of the Mushroom Promotion, Research and Consumer Information Act of 1990, as amended, 7 U.S.C. §§ 6101-6112 (hereinafter the "Mushroom Law").

NATURE OF THIS ACTION

3. On June 25, 1996, United Foods filed with the U.S.D.A. a petition under the Mushroom Law, pursuant to 7 U.S.C. § 6106(a), alleging that the Mushroom Law and assessments pursuant to the Mushroom Law violate United Foods' rights to freedom of speech and freedom of association guaranteed under the First Amendment of the Constitution of the United States and United Foods' right to equal protection under the Fifth Amendment to the Constitution.

4. On March 4, 1998, the U.S.D.A. entered a Decision and Order denying the relief requested by United Foods and dismissing United Foods' petition.

5. United Foods is bringing this action pursuant to 7 U.S.C. § 6106(b). In this action, United Foods is challenging and is requesting this Court to review the Decision and Order by the U.S.D.A.

JURISDICTION AND VENUE

6. This Court has jurisdiction pursuant to 7 U.S.C. § 6106(b) of the Mushroom Law, which authorizes the District Court to review any decision by the Secretary of the U.S.D.A. following the Secretary's decision on a petition filed pursuant to 7 U.S.C. § 6106(a). This Court also has jurisdiction pursuant to 5 U.S.C. §§ 702 through 706 which provides jurisdiction to the District Courts to review agency actions.

7. This Court also has jurisdiction pursuant to 28 U.S. C. §§ 2201 and 2202 in order to declare the rights and obligations of United Foods and the U.S.D.A. in administrative proceedings brought pursuant to 7 U.S.C. § 6106.

8. Venue is appropriate in this District because United Foods does business within this District. 7 U.S.C. § 6106(b)(1).

FACTUAL BACKGROUND

9. United Foods began approximately fifty years ago processing and selling frozen foods. United Foods processes, markets and distributes a full line of frozen vegetables.

10. Pictsweet Mushroom Farms, a division of United Foods, began in 1987 to engage in the business of producing fresh mushrooms. Pictsweet Mushroom Farms is structured as three separate business units, with a mushroom farm in Ventura, California, one in Salem, Oregon, and one in Fillmore, Utah.

11. Through its Pictsweet division, United Foods grows, markets and distributes more than 500,000 pounds of fresh mushrooms per year. United Foods sells mushrooms in the retail, wholesale and food service channels of trade.

12. Growing, marketing and distributing fresh mushrooms is a service-oriented business.

13. Fresh mushrooms are not sold in a geographic market that is nationwide in scope. Because fresh

mushrooms have a short shelf life and are light weight, fresh mushrooms cannot be efficiently transported long distances. Consequently, fresh mushroom producers such as United Foods must sell their mushrooms within relatively small geographic regions surrounding the mushroom farms where the mushrooms are produced. In these respects, fresh mushrooms are unique as compared to most other agricultural products.

14. Because of the nature of the fresh mushroom industry and the location of United Foods' mushroom farms, United Foods sells its mushrooms in three separate regional markets: (i) Southern California and Arizona; (i) [sic] the Pacific Northwest; and (iii) the Central Rocky Mountain States.

15. The regional markets for fresh mushrooms are self-contained. The supply of fresh mushrooms in a regional market, and the market prices for those mushrooms, are determined primarily by factors that exist within that regional market. Supply and market prices for fresh mushrooms within a regional market are less affected by producers or other factors that exist outside that regional market.

16. Within each regional market for fresh mushrooms, market prices are sensitive to the quantity of fresh mushrooms that are produced in that market. In turn, as prices increase, the quantity of fresh mushrooms that are produced in that market will increase, such that prices will stabilize through the operation of natural market forces. Producers in most regional markets have the capacity to increase or decrease production within a relatively short period of time,

approximately three (3) months, to respond to changes in market price.

17. Fresh mushrooms are not a homogenous product: there are different varieties of fresh mushrooms; different producers offer different kinds and levels of service in connection with the marketing of their fresh mushrooms; different producers use different kinds and styles of packaging for their fresh mushrooms; and the quality of fresh mushrooms sold by different producers is different.

18. The primary customers of United Foods and other producers of fresh mushrooms are retail grocery outlets. In the regional markets where United Foods sells its fresh mushrooms, the retail grocery industry has been rapidly consolidating into a smaller number of larger grocery chains; and, therefore, the total number of United Foods' customers within its fresh mushroom markets has become smaller.

19. United Foods, like other fresh mushroom producers, engages in independent marketing activities, at its own expense, that are geared towards the regional markets in which it sells its product. Because of the regional nature of the industry, fresh mushroom producers do not independently engage in nationwide marketing activities.

20. To be successful, marketing efforts by United Foods or other fresh mushroom producers must accomplish at least two objectives. First, the fresh mushroom producer must establish favorable relationships with the grocery stores in the region, and together the fresh mushroom producer and the grocery store must de-

velop customized marketing programs that are geared to the customer demands in the region and the unique qualities of the fresh mushrooms sold by the producer. Second, the fresh mushroom producer must advertise the distinguishing characteristics of the fresh mushrooms which it produces.

21. In 1990 Congress enacted the Mushroom Law, 7 U.S.C. §§ 6101-6112. Pursuant to the Mushroom Law, the U.S.D.A. promulgated the Mushroom Promotion, Research, and Consumer Information Order at 7 C.F.R. §§ 1209.200-.280 (hereinafter, the "Mushroom Order").

22. The Mushroom Order provides for the formation of a Mushroom Council, which is a committee of competitors of United Foods appointed by the Secretary of Agriculture. The Mushroom Council exists to develop industry-wide (*i.e.* nationwide) promotion, research and consumer information programs for mushrooms, ostensibly to stimulate the demand for fresh mushrooms. *See* 7 U.S.C. § 6104(c)(4), 6101(b); 7 C.F.R. § 1209.38(a), (b), (c), (j), (1), 1209.40. These are "generic" promotional programs in that they do not recognize the distinguishing characteristics of the different mushrooms and related services offered by the different mushroom producers. These programs also fail to recognize that mushroom markets are regional in nature, and that the effectiveness of different kinds of marketing and promotional techniques will depend upon the types and quality of the mushrooms and services being offered and the regions in which the mushrooms and services are being sold.

23. Funds for the generic promotional and advertising programs developed by the Mushroom Council are

generated by levying assessments on larger mushroom producers and importers of mushrooms, based upon the poundage of mushrooms marketed for fresh use in the United States. 7 U.S.C. § 6101(b), 6104(g)(1), (3); 7 C.F.R. § 1209.50(b), 1209.51. Because United Foods produces and sells more than 500,000 pounds of fresh mushrooms per year, United Foods is subject to the assessments of the Mushroom Council.

24. The Mushroom Law contains "free-rider" provisions which exempt certain groups of mushroom producers from assessments for financing the Mushroom Council programs. These provisions permit the exempt mushroom producers to "free-ride" on the purported benefits of the promotional and advertising programs. For example, by definition, the Mushroom Law excludes assessments for the mushroom producer who sells less than 500,000 pounds of fresh mushrooms per year in the domestic market, 7 U.S.C. § 6102(11), or for producers who sell their product in the processed forms, including marinated, canned, frozen, cooked, blanched, dried, or "otherwise processed" forms. 7 U.S.C. § 6102(9). The Mushroom Law also exempts from assessments mushrooms produced in the United States that are sold in the export market. 7 U.S.C. § 6104(g)(4).

25. The generic promotional and advertising programs developed by the Mushroom Council have had no discernable effect on the different fresh mushroom markets in the United States or on consumer demand for fresh mushrooms. There are several reasons for this. Among other things: the funds generated through assessments are inadequate to promote fresh mushrooms on a nation-wide scale; nation-wide advertising

and promotional program will be incapable of materially influencing consumer demand in the various unique regional markets that exist for fresh mushrooms; the Mushroom Council programs cannot assist producers like United Foods in providing better quality of product or service to customers, which is necessary to any successful marketing program; the Mushroom Council programs are incapable of distinguishing the fresh mushrooms and services offered by the different producers, which is also essential to any successful marketing program; and the Mushroom Council programs, by definition, cannot regulate the regional markets for fresh mushrooms.

26. United Foods is opposed to the general content of the Mushroom Council's programs. The Mushroom Council's programs portray fresh mushrooms as a homogenous product, which is not true. By portraying fresh mushrooms in this manner, the Mushroom Council delivers a message to the general public which is contrary to the message United Foods attempts to deliver to its customers in its regional markets. United Foods, in its marketing programs, attempts to portray its fresh mushroom products as unique, which they are. The content of the Mushroom Council's programs, therefore, runs contrary to the interests of United Foods.

27. United Foods has also objected to the specific content of certain of the Mushroom Council's programs. For example, United Foods objected to the Mushroom Council's portrayal of mushrooms as an aphrodisiac, which United Foods felt was inaccurate and inappropriate.

28. The Mushroom Law deals only with the advertising and promotion of mushrooms. The Mushroom Law does not purport to regulate the mushroom industry. For example, the Mushroom Law does not regulate price, size, pack, maturity, production levels, quotas, reserves, or any other matters that are designed to restrict competition and/or stabilize markets or prices. Rather, the Mushroom Law exists only for the purpose of compelling certain mushroom producers and handlers to fund advertising and promotional activities of the Mushroom Council.

29. The Mushroom Law does not serve a legitimate governmental interest.

30. The Mushroom Law and the Mushroom Order violate United Foods' right to freedom of speech under the First Amendment of the United States Constitution, in that the Mushroom Order wrongfully compels United Foods to fund the speech of the Mushroom Council. This speech is objectionable to United Foods, this speech is contrary to the interests of United Foods, and this speech neither serves nor is ancillary to any legitimate economic or other governmental purpose.

31. The Mushroom Law and the Mushroom Order violate United Foods' right to freedom of association under the First Amendment of the United States Constitution, in that the Mushroom Order wrongfully compels United Foods to associate with the Mushroom Council and the other mushroom producers represented by the Mushroom Council.

32. The Mushroom Law and the Mushroom Order violate United Foods' right to equal protection under

the Fifth Amendment of the United States Constitution, in that certain mushroom producers are exempted from assessments to fund the advertising and promotional activities of the Mushroom Council, and there is no rational basis for the discriminatory treatment of the different classes of mushroom producers provided for under the Mushroom Law.

PROCEDURAL AND LEGAL BACKGROUND

33. On June 25, 1996, United Foods filed with the U.S.D.A. its administrative petition (MPRCIA Docket No. 96-001) challenging the constitutionality of the Mushroom Law and the Mushroom Order.

34. On November 15, 1996, the Administrative Law Judge who was assigned to the case stayed the administrative proceeding because of the pending action by the United States Supreme Court in *Cal-Almond, Inc. v. Department of Agric.*, 14 F.3d 429 (9th Cir. 1993), 67 F.3d 874 (9th Cir. 1995), and *Wileman Bros. & Elliott, Inc. v. Espy. Inc.*, 58 F.3d 1367 (9th Cir. 1995), *cert. granted sub nom., Glickman v. Wileman Bros. & Elliott, Inc.*, 116 S.Ct. 1875 (1996).

35. On June 25, 1997, the Supreme Court entered its decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S.Ct. 2130 (1997), *reh'd denied*, 118 S.Ct. 25 (1997). The Supreme Court, in a 5 to 4 opinion, reversed the Ninth Circuit and held that compelled funding of generic advertising of California nectarines, plums, and peaches in accordance with certain Marketing Orders issued under the Agricultural Marketing Agreement Act of 1937 (the AMAA) was not unconstitutional.

36. On December 9, 1997, the Administrative Law Judge in United Foods' administrative proceeding issued a Decision and Order of Dismissal which concluded that *Wileman Bros., supra,* was dispositive of the issues raised by United Foods in that proceeding.

37. On January 14, 1998, United Foods appealed the Administrative Law Judge's decision to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).

38. On March 4, 1998, the Judicial Officer issued a Decision and Order affirming the decision of the Administrative Law Judge. It is this Decision and Order which United Foods is hereby challenging and asking this Court to review.

39. Contrary to the ruling by the Judicial Officer in the U.S.D.A. administrative proceeding, *Wileman Bros., supra,* is not dispositive of the constitutional claims asserted by United Foods, for the following reasons:

(1) The First Amendment issue in *Wileman Bros.* arose in the context of a detailed regulatory scheme that restricts competition among California nectarine and peach growers in order to maintain stable marketing conditions for those agricultural products. 117 S.Ct. at 2134-35. The Court in *Wileman Bros.* held, essentially, that generic advertising provisions that are ancillary to a broad and detailed marketing scheme designed to stabilize markets are not subject to traditional First

Amendment analysis. The Court noted that the regulatory scheme in *Wileman Bros.* has many collectivist goals unrelated to advertising, and generic advertising in the context of that regulatory scheme is constitutionally justified because it serves the collectivist goals of the regulatory scheme.

(2) The First Amendment issues in United Foods' case, on the other hand, do not arise in the context of such a regulatory scheme. The Mushroom Law is free standing legislation with no regulatory intent except to collect assessments for promotion, advertising, and research. The Mushroom Law does not purport to restrict competition or to regulate the mushroom market. The Supreme Court in *Wileman Bros.* did not address the constitutionality of the kinds of compelled advertising and promotional activities that are at issue in United Foods' case.

(3) This distinction is central to the holding in *Wileman Bros.* The Supreme Court majority in *Wileman* Bros. made clear that its decision must be understood in the context of the statutory scheme in which the First Amendment issue arose in that case. The majority opinion said:

> The legal question that we address is whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve.
>
> **In answering that question we stress the importance of the statutory context in which it arises.** California nectarines and peaches are

> marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. **The business entities that are compelled to fund the generic advertising at issue in this litigation do so as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme. It is in this context that we consider whether we should review the assessments used to fund collective advertising, together with other collective activities, under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment issues.**

117 S. Ct. at 2138 (emphasis added). Later in the decision the Court said:

> Generic advertising is intended to stimulate consumer demand for an agricultural product **in a regulated market**. That purpose is legitimate and consistent with the regulatory goals of the overall statutory scheme.

Id. at 2141 (emphasis added). And towards the end of its opinion, the majority said:

> In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments.

Id. at 2142.

(4) The regulatory scheme at issue in *Wileman Bros.* was a "marketing order" promulgated under the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. § 601 *et seq.*. As the Court explained, "Marketing orders promulgated pursuant to the AMAA are a species of economic regulation that has displaced competition in a number of discrete markets; . . ." *Id.* at 2134. The purpose of these marketing orders is to regulate and limit competition in order "to establish and maintain such orderly marketing conditions for [certain agricultural commodities] . . . as will provide . . . an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. § 602(4). These marketing orders may impose uniform prices in a particular market, limitations on the quality and quantity of the commodity that may be marketed, determinations of grade and size of the commodity, and orderly disposition of any surplus that might suppress market prices. These marketing orders may also authorize joint research and development projects, inspection procedures, and standardized packaging requirements. *Id.*. *See, e.g.*, 7 U.S.C. § § 602(4) and 60c(6) .

(5) Because the generic advertising provisions at issue in *Wileman Bros.* were contained within a broad and detailed regulatory scheme that restricted competition and required collective action in order to stabilize markets, the Court held that the *Central Hudson* test applied by the Ninth

Circuit was inappropriate. "The Court of Appeals' decision to apply the *Central Hudson* test is inconsistent with the very nature and purpose of the collective action program at issue here." *Id.* at 2141.

(6) By contrast, the Mushroom Law in United Foods' case was not promulgated under the AMAA. Rather, it was promulgated pursuant to an entirely different statute, the "Mushroom Act" set forth in 7 U.S.C. § 6101 *et seq.* The purpose of the "Mushroom Act" has nothing to do with regulating markets by restricting competition and requiring collective action in the production, distribution, and sale of certain products. Contrary to the AMAA, the sole purpose of the "Mushroom Act" is to compel mushroom producers to finance advertising and promotional programs developed by the Mushroom Council. The "Mushroom Act" was enacted in 1990 to create:

> [A]n orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and coordinated program of promotion, research, and consumer and industry information designed to—
>
> (1) strengthen the mushroom industry's position in the marketplace;
>
> (2) maintain and expand existing markets and uses for mushrooms; and

(3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101(6). The advertising and promotional purposes of the "Mushroom Act" bear no resemblance to the economic regulatory purposes of the AMAA.

(7). Because the regulatory scheme involved in the *Wileman Bros.* case was fundamentally different from the Mushroom Law at issue in United Foods' case, the Supreme Court's decision in *Wileman Bros.* is not dispositive of the constitutional issues raised by United Foods. Indeed, *Wileman Bros.* assists United Foods' position. The Supreme Court implied that but for the fact of an expansive regulatory scheme designed to stabilize markets, a generic advertising program would be unconstitutional. Because the Mushroom Law is neither designed nor intended to stabilize the mushroom market (it exists only to expand the market), its generic advertising program violates United Foods' First Amendment rights.

(8) In addition, in *Wileman Bros.* the Supreme Court did not address the equal protection issues that are present in United Foods' case. In *Wileman Bros.* there was no discussion of the constitutional ramifications of creating the kinds of exemptions from assessments that exist under the Mushroom Law.

WHEREFORE, United Foods prays for the following relief:

1. A judgment declaring that the Mushroom Law and the Mushroom Order violate United Foods' constitutionally guaranteed rights to freedom of speech and freedom of association under the First Amendment of the United States Constitution and United Foods' constitutionally guaranteed right to equal protection under the Fifth Amendment of the United States Constitution.

2. A judgment invalidating assessments under the Mushroom Order and declaring that United Foods shall not be subject to any such past, present or future assessments.

3. An Order granting United Foods a temporary and permanent injunction prohibiting the United States Department of Agriculture or the Mushroom Council from enforcing against United Foods any assessments under the Mushroom Law or the Mushroom Order.

4. An award of attorneys' fees and costs under the Equal Access to Justice Act.

5. Such further relief as the Court deems appropriate.

Respectfully submitted:

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PROGRAM ANNOUNCEMENT

United States
Department of Agriculture

Agricultural Marketing Service

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Release No. AMS-071-98

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MUSHROOM INDUSTRY VOTES TO CONTINUE PROMOTION PROGRAM

WASHINGTON, March 20, 1998—The U.S. Department of Agriculture today announced that the mushroom industry has voted to continue the promotion, research, and consumer information program for fresh mushrooms. The program is authorized by the Mushroom Promotion, Research, and Consumer Information Act of 1990. USDA's Agricultural Marketing Service conducted a referendum Feb. 24 - March 13.

Dr. Enrique E. Figueroa, administrator of AMS, said, "The results of the referendum indicate that 80 percent of those who voted favored continuance of the order

and they represented 70 percent of the volume of mushrooms produced by those who voted."

The program needed the approval of a majority of the voters who represented more than 50 percent of the volume of mushrooms produced and imported by those voting in the referendum.

The program is administered by a council of nine industry representatives. The program is funded by an assessment rate of 0.45 of one cent per pound of mushrooms paid by persons who annually produce or import an average of more than 500,000 pounds of mushrooms.

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http://www.ams.usda.gov/news/newsrel.htm

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

MPRCIA Docket No. 95-1

IN RE: DONALD B. MILLS, INC.,
A CALIFORNIA CORPORATION,
D/B/A/ DBM MUSHROOMS, PETITIONER

[Filed: Apr. 26, 1996]

DECISION

This is an administrative adjudicatory proceeding pursuant to 7 U.S.C. § 6106(a) in which Petitioner challenges provisions of the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended, (7 U.S.C. §§ 6101-6112) (the "Act"), and the Mushroom Promotion, Research, and Consumer Information Order (7 C.F.R. §§ 1209.1-1209.77) (the "Order"). This proceeding was instituted by a Petition, filed on March 15, 1995, by Donald B. Mills, Inc., in which Petitioner alleged that the Act and order violated provisions of the United States Constitution. Respondent, the Administrator of the Agricultural Marketing Service of the United States Department of Agriculture ("USDA" or the "Department"), filed an Answer on April 14, 1995, which denied that the Act or Order violated the Constitution.

A hearing was held in San Francisco, California, on August 15-17, 1995. Petitioner was represented by

Brian C. Leighton, Fresno, California. Respondent was represented by Gregory Cooper, Office of the General Counsel, United States Department of Agriculture.

The parties have submitted proposed findings, proposed conclusions, and numerous briefs. All proposed findings, proposed conclusions, and arguments have been considered. To the extent indicated, they have been adopted. Otberwise, they have been rejected as irrelevant or not supported by the evidence. In this opinion, "Tr." refers to the transcript of the hearing; "PX" refers to the numbered exhibits offered by Petitioner; and "RX" refers to the numbered exhibits offered by Respondent.

Statutory and Regulatory Background

The Mushroom Promotion, Research, and Consumer Information Act was enacted in 1990 to create:

> [A]n orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and coordinated program of promotion, research, and consumer and industry information designed to—
>
> (1) strengthen the mushroom industry's position in the marketplace;
>
> (2) maintain and expand existing markets and uses for mushrooms; and
>
> (3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101.[12]

The Act provides for the establishment of an Order, 7 U.S.C. § 6103, and of the Mushroom Council, 7 U.S.C. § 6104(b), with power, *inter alia*:

(1) to administer the order in accordance with its terms and provisions;

. . . .

---

[12] The Act (7 U.S.C. § 6101(a)) contained the following findings:

(1) mushrooms are an important food that is a valuable part of the human diet;

(2) the production of mushrooms plays a significant role in the Nation's economy in that mushroom are produced by hundreds of mushroom producers, distributed through thousands of wholesale and retail outlets, and consumed by millions of people throughout the United States and foreign countries;

(3) mushroom production benefits the environment by efficiently using agricultural byproducts;

(4) mushrooms must be high quality, readily available, handled properly, and marketed efficiently to ensure that the benefits of this important product are available to the people of the United States:

(5) the maintenance and expansion of existing markets and uses, and the development of new markets and uses, for mushrooms are vital to the welfare of producers and those concerned with marketing and using mushrooms, as well as to the agricultural economy of the Nation;

(6) the cooperative development, financing, and implementation of a coordinated program of mushroom promotion, research, and consumer information are necessary to maintain and expand existing markers for mushrooms; and

(7) mushrooms move in interstate and foreign commerce, and mushrooms that do not move in such channels of commerce directly burden or affect interstate commerce in mushrooms.

(4) to propose, receive, evaluate, approve, and submit to the Secretary for approval under subsection (d) of this section budgets, plans, and projects of mushroom promotion, research, consumer information. and industry information, as well as to contract and enter into agreements with appropriate persons to implement such plans or projects;

. . . .

(6) to receive, investigate, and report to the Secretary complaints of violations of the order

. . . .

7 U.S.C. § 6104(c).

Assessments at a rate of $.0025 per pound, 7 U.S.C. § 6104(g)(2), are levied on mushroom producers and importers, 7 U.S.C. § 6104(g)(1). First handlers are required to collect such assessments from their producers and to remit the collected assessments to the Council. 7 U.S.C. § 6104(g)(1)(A).

Three categories of mushrooms or producers are excluded from assessments. First, assessments under the Act only apply to mushrooms ". . . grown within the United States for the fresh market, or imported into the United States for the fresh market, that are marketed. . . ." Thus, the Act specifically excludes ". . . mushrooms that are commercially marinated, canned, frozen, cooked, blanched, dried, packaged in brine, or otherwise processed, as may be determined by the Secretary." 7 U.S.C. § 6102(9). Second, assessments under the Act only apply to producers and importers who produce or import ". . . on average, over

500,000 pounds of mushrooms" annually for the fresh market. 7 U.S.C. §§ 6102(6) and (11). Third, assessments under the Act do not apply to exported mushrooms. 7 U.S.C. § 6104(g)(4).

Findings of Fact

1. Petitioner, Donald B. Mills, Inc., is a producer and first handler of mushrooms. Petitioner grows approximately three million pounds of mushrooms per year, with approximately 75% of them going to the fresh market (Tr. 729-30).

2. Petitioner's market is in Oakland, south San Francisco, and San Francisco (Tr. 727).

3. Pictsweet Mushroom Farms is one of the largest fresh mushroom producers in the United States. Pictsweet began operating in 1987, and its sales have increased every year (Tr. 595, 600-01).

4. Official government statistics indicate that in 1966, 75% of mushrooms produced in the United States were used for processing and 25% for fresh use. By 1993, 69% went for fresh use and only 31% went for processing (RX 69, p. 15).

5. In 1992-1993, total United States production of mushrooms for fresh use was valued at $537,922,000 (RX 69, pp. 12, 20). Exports of fresh mushrooms peaked in 1990, totaling approximately $22,000,000 (RX 43, p. 29).

6. United States per capita fresh mushroom consumption is far below that of Canada and other Western European nations (RX 43, pp. 7, 9).

7. In 1993-1994, there were approximately 355 producers and 520 million pounds of mushrooms for fresh use (RX 69, pp. 9, 15).

8. Mushrooms are grown commercially in many states (RX 69, p. 20, n. 5). However, 43% are produced in Pennsylvania and 17% are produced in California (Tr. 328-29). Less than 1% of the domestic fresh mushroom market is from imports (RX 24, p. 1).

9. There is not an over supply of mushrooms but an adequate supply (Tr. 276).

10. Mushrooms are not a homogeneous product because there are different varieties, there are different levels of service that are attached to all mushrooms that make their value different, there are different packaging types and styles, and the quality is very different (Tr. 658-60).

11. Mushrooms are impulse items, i.e., they are not an essential part of the consumer's life and their diet. Therefore, if the product does not look good, the consumers will not buy it (Tr. 660). Produce managers of grocery stores and grocery chains buy based upon consumer demand (Tr. 736).

12. Mushrooms have very little nutritional value (Tr. 327-28, 514).

13. Selling of fresh mushrooms must be in a very regional market because mushrooms cannot be shipped long distances and have an extremely short shelf life (Tr. 601).

14. On a national basis, there is no one company or companies that have a monopoly or oligopoly because of

the regional nature of the business, but regionally the opposite is true, where only a few producers control the market (Tr. 660-63).

15. The Mushroom Order became effective on January 8, 1993 (RX 27), and the Mushroom Council was first seated on June 24, 1993 (RX 60, p. 1).

16. The strategic plan of the Mushroom Council is to increase per capita consumption of mushrooms (Tr. 515-16). From 1970 through 1993, total mushroom consumption increased every year (Tr. 394), although per capita consumption decreased in the 1990's after having increased in the 1980's (Tr. 190; RX 43, p. 7).

17. The Mushroom Council began collecting assessments from mushroom producers and importers on August 1, 1993 (Tr. 200).

18. Assessments under the Mushroom Promotion, Research, and Consumer Information Act and the Mushroom Promotion, Research, and Consumer Information Order are levied on fresh mushroom producers and importers at a rate of $.0025 per pound. Assessment reports and checks are submitted monthly (Tr. 257).

19. Only producers or importers averaging over 500,000 pounds annually for the fresh domestic market are subject to assessments. One hundred fifty-two mushroom producers in the United States are subject to assessments as they each produce over 500,000 pounds of mushrooms for the fresh domestic market (Tr. 329). In 1995, the Mushroom Council collected assessments from these 152 producers encompassing

515-518 million pounds of mushrooms for fresh use (Tr. 252).

20. Fifty-nine fresh mushroom producers have filed exemptions with the Mushroom Council claiming that they produce 500,000 pounds or less of fresh mushrooms annually for the domestic market and are therefore exempt from assessments (Tr. 329).

21. Mushrooms for export and mushrooms for processing are excluded from the program.

22. Many fresh mushroom producers engage in individual promotion program that increase consumption (Tr. 730-31, 740-41, 750-56).

23. In 1995, the Mushroom Council had a budget of $1.3 million (Tr. 197). This is an extremely small budget (Tr. 127, 393). There are essentially three parts to the Council's promotion program: retail merchandising promotion, consumer publicity and education, and food service promotion (Tr. 229).

24. The Mushroom Council's president and public relations director have engaged in an aggressive, imaginative campaign of advertising and promotion. This has included preparation of press releases, articles, brochures, kits, and photographs which are distributed to newspapers, radio stations, retailers, consumers, and even schools. These materials are attractive and informative. Much free publicity has been obtained as a result of the Council's efforts.

25. Econometric modeling is a precise method of measuring the effectiveness of a promotion program (Tr. 28-29). The Mushroom Council's Program cannot

be measured econometrically because it began mainly in 1995, and several years data is necessary to conduct a complete analysis (Tr. 32-33, 103).

26. Neither the Mushroom Council nor any of the firms that it has employed have done any study to determine whether or not the Council's programs have increased demand for mushrooms (Tr. 299-301).

27. None of the promotional and educational programs engaged in by the Mushroom Council has revealed any increase in consumption, price, or demand for mushrooms (Tr. 294, 324, 517-18, 522-25, 642-44, 648-49, 740-51).

Discussion

First Amendment Analysis

I. The Criteria to be Applied

Petitioner argues that two decisions of the United States Court of Appeals for the Ninth Circuit apply to this case and, based upon those decisions, the Mushroom Promotion Program established by USDA violates the First Amendment of the United States Constitution and is, therefore, unconstitutional. The cases are *Wileman Bros. v. Espy*, 58 F.3d 1367 (9th Cir. 1995) and *Cal-Almond v. United States Dep't of Agric.*, 14 F.3d 429 (9th Cir. 1993). Respondents argues that these cases do not apply to the facts at hand, are incorrectly decided, and should not be followed.[13]

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[13] USDA filed a petition for a *writ of certiorari* in the United States Supreme Court in *Wileman* (Jan. 24, 1996).

The Ninth Circuit held that the government's generic advertising programs for California peaches, nectarines, and plums in *Wileman* and for almonds in *Cal-Almond* were invalid because they did not comply with a three-part test enunciated by the Supreme Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

In *Central Hudson*, the Supreme Court held that "[t]he First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation." *Central Hudson*, 447 U.S. at 561. If commercial speech is neither misleading nor related to unlawful activity, restrictions on such speech must: 1) implement a substantial government interest; 2) directly advance that interest; and 3) be narrowly tailored to achieve the desired objective. *See Board of Trustees v. Fox*, 492 U.S. 469 (1989).

In accordance with the decisions of the Ninth Circuit in *Cal-Almond* and *Wileman*, I find that the Mushroom Promotion Program in this case does not satisfy the Supreme Court's three-part *Central Hudson* test. Although there is a substantial government interest in connection with the Mushroom Program, the program does not directly advance that interest and is not sufficiently narrowly tailored.

A. Substantial Government Interest

Congress stated that the mushroom legislation was passed to "strengthen the mushroom industry's position in the market place," "maintain and expand existing markets . . ." and "develop new markets and uses for mushrooms." 7 U.S.C. § 6101. The Ninth Circuit

has held that there is a substantial and legitimate government interest in creating effective mandatory cooperative promotion and information programs to stimulate market demand for the financial benefit of the producers in the peach and nectarine industry in *Wileman* and the almond industry in *Cal-Almond*. The court in *Cal-Almond* required no specific analysis of the almond industry or its profitability trends before it concluded: "We agree that stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry is a substantial state interest." *Cal-Almond*, 14 F.3d at 437.

Similarly, the court in *Wileman* endorsed the same conclusion although there was absolutely no evidence suggesting that the treefruit industry was in any distress that required rescuing. *Wileman Bros. & Elliott v. Espy*, 58 F.3d 1367, 1378 (9th Cir. 1995).

I find, therefore, that the government's interest in promoting and expanding the mushroom industry is substantial.

B. Direct Advancement

The court in *Cal-Almond* stated, "As a starting point for our analysis, therefore we must determine how effective the Board's own almond promotion efforts are." *Cal-Almond*, 14 F.3d at 437.

A court will not merely assume that the legislative program will always advance the asserted state interest sufficiently to justify its abridgment on commercial free speech. *City Council v. Taxpayers for Vincent*,

466 U.S. 789, 803 n. 22 (1984). As the court held in

Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1592 (1985),

> In *Edenfield*, we decided that the Government carries the burden of showing that the challenged regulation advances the Government's interest 'in a direct and material way.' *Id.*, at ___, 113 S. Ct., at 1798. That burden 'is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' (internal citation omitted).

The Supreme Court assumes as a matter of law that advertising increases consumption of the product being advertised. *See, e.g., Wileman*, 58 F.3d at 1378; *Cal-Almond*, 14 F.3d at 439; *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342 (1986). As stated by the Ninth Circuit in *Wileman*, "the question is whether the mandatory generic advertising program sells the product more effectively than the 'specific, targeted marketing efforts of individual handlers.'" *Wileman*, 58 F. 3d at 1378 (citing *Cal-Almond*, 14 F.3d at 439).

In *Cal-Almond*, almond handlers presented evidence that the assessments collected by the Almond Board hindered their own advertising efforts. Because the Secretary could not provide evidence that the generic advertising program was more effective at promoting almonds than the individual efforts of the handlers, the

Ninth Circuit held that the Almond Board's advertising and promotion program did not directly advance the government's interest:

> We agree with [the handlers'] argument that each handler knows best how to sell his own almonds; we are unwilling to presume, in the absence of hard evidence to the contrary, that a government agency is better at marketing than an individual businessperson.

Cal-Almond, 14 F.3d at 439.

Similarly, in *Wileman*, the Ninth Circuit stated:

> [T]he Secretary has demonstrated that advertising increases consumption of peaches and nectarines but has not gone the necessary next step of demonstrating that the generic advertising program is better at increasing consumption than individualized advertising, as *Cal-Almond* requires. Thus, the generic advertising programs for peaches and nectarines do not "directly advance" the government's interest and fail the second prong of the *Central Hudson* test.

Wileman, 58 F.9d at 1379.

Petitioner contends that "there is absolutely no evidence presented by the government that the Mushroom Council's mandatory assessment program for promotion, education and advertising has substantially increased [the] government interest [in increasing sales of mushrooms]." (Petitioner's Brief at 16). This point is confirmed by Respondent's witnesses and other evi-

dence. Wade Whitfield, the president and CEO of the Mushroom Council since October 1, 1993, testified that neither the Council nor any of the firms that it has employed have done any study to determine whether or not the Council's programs have increased demand for mushrooms (Tr. 299-301). Similarly, Robyn Wilk, the Mushroom Council's public relations director, testified that the Mushroom Council has no information that any of the programs completed is 1995 have increased the consumption or sale of mushrooms (Tr. 517-18). Additionally, John Haltom, president of Pictsweet Mushroom Farms, another mushroom producer, and also treasurer of the Mushroom Council, testified that he has seen no measurable improvement and no impact from the Council's promotional and educational research efforts (Tr. 642-44).

In 1995, the Mushroom Council had a budget of $1.3 million (Tr. 197). There were three main categories of spending by the Council in 1995: 1) retail merchandising promotion; 2) consumer publicity and education; and 3) food service promotion (Tr. 229).

The efforts of the Mushroom Council are impressive and commendable. For example, a "color page" advertisement was prepared for newspapers with mushroom photography, facts, and recipes, and has, to date, been run in more than 160 newspapers (Tr. 227, 498; RX 74, items 3-5; RX 75). The page won an award as one of the top 20 pages of the year (Tr. 525-26). In addition, the Council distributed the "Blueprint for Profit," a retail kit with a shelf layout schematic, care and handling cards for consumers, and a full color chart for produce clerks showing varieties, uses, flavors, and handling requirements, to half of the country's supermarkets and

1,500 smaller stores (Tr. 230, 236-45; RX 72, items 5, 6). The Council also developed a comprehensive education program to help raise children's preferences for mushrooms (Tr. 452-54; RX 58, pp. 6, 8).

Econometric modeling is a precise method of measuring the effectiveness of a promotion program. The mushroom industry cannot be measured econometrically because the program is relatively new, and several years' data are necessary to conduct a complete analysis (Tr. 32-33, 103). Thus, although the public relations and educational programs run by the Council were performed very well, the Council has seen no measurable benefit in increased sales of mushrooms as a result of those programs (Tr. 648-49).

The Department has demonstrated that advertising increases consumption of mushrooms. However, the Department has not shown that the efforts of the Mushroom Council are better at increasing consumption than the individual efforts of the mushroom handlers. None of the government witnesses could substantiate that any part of their program increased sales of, demand for, or the price of mushrooms, nor could they show that new markets had been expanded, new uses had been found, or that the program strengthened the mushroom industry's position in the marketplace (Petitioner's Brief at 17). Thus, the Mushroom Council's program has not "directly advanced" the government's interest and fails the second part of the *Central Hudson* test.

C. Narrowly-Tailored

Respondent contends that the Mushroom Council's program has been properly designed based on exten-

sive research, testing, and accepted promotional techniques and is sufficiently narrowly tailored to promote mushroom sales. Respondent must also demonstrate that the Mushroom Order and Regulations are no more extensive than necessary to serve the interest of promoting mushroom sales. In *Board of Trustees of State Univ. v. Fox*, 492 U.S. 469, 480 (1989), the Supreme Court held that this standard is not as strict as a "least restrictive means" test:

> What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends,"—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served"; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.

(internal citations omitted).

In *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1593-94 (1995), the Court stated that the availability of options, "all of which could advance the Government's asserted interest in a manner less intrusive to . . . [a handler's] First Amendment rights, indicates that the . . . [government action] is more extensive than necessary."

Petitioner asserts that the Mushroom Council's program is more restrictive than necessary to achieve the governmental purpose because: 1) a portion of the assessments collected by the Council is being used for commission overhead and expenses, thereby duplicating the handlers' own overhead expenses for marketing their mushrooms; 2) handlers are not given credit for

their own promotional and marketing efforts and expenses, thereby discouraging private advertising; 3) producers of five hundred thousand pounds or less of fresh mushrooms annually, those that process mushrooms, and mushroom exporters are not required to pay the assessments and receive a "free ride" from their larger competitors; and 4) the Mushroom Council's efforts will spread the idea that all fresh mushrooms and brands are the same which undercuts Petitioner's message that its mushrooms are better (Petition at 5-6).

In *Cal-Almond*, the Ninth Circuit held that although handlers could receive credit for their own promotional and advertising programs, the types of promotions and advertising for which a handler could get credit were too limited, and therefore, the program was "more extensive than necessary to serve the interest of increasing almond sales." *Cal-Almond*, 14 F.3d at 440. In *Wileman*, the court stated that since no credit whatsoever was given to the peach and nectarine handlers for their individual advertising and promotion efforts, it was consequently far more extensive than necessary to carry out the governmental purpose. *Wileman*, 58 F.3d at 1379-80.

Similarly, mushroom handlers do not receive credit for their own advertising and promotion efforts. Therefore, the Mushroom Council's program is not narrowly tailored and fails the third part of the *Central Hudson* test.

In conclusion, although the Department has a substantial interest in promoting mushrooms, the forced contributions to the Mushroom Council contravene the First Amendment rights of mushroom handlers. The Mushroom Council's program neither directly advances

the government's interest, nor is it sufficiently narrowly tailored. The program, therefore, fails to satisfy the second and third parts of the *Central Hudson* test and violates the First Amendment.

In accordance with the determinations by the Ninth Circuit in *Wileman* and *Cal-Almond*, since the Mushroom Council's program has been found unconstitutional under the less stringent standard for commercial speech set forth in *Central Hudson*, it is unnecessary to reach the issue of whether the program meets the Supreme Court's test for permissible government restriction on freedom of association. *Wileman*, 58 F.3d at 1377-78; *Cal-Almond*, 14 F.3d at 436.

II. Should *Cal-Almond* and *Wileman* be Followed?

Respondent argues that the Department of Agriculture should not follow the decisions of the Ninth Circuit in *Wileman* and *Cal-Almond* (Respondent's Brief at 20-26), stating in its reply brief that "[t]he Secretary enjoys a national jurisdiction and is not constrained by law or policy to knee-jerk subservience to the dictates of any district or circuit court." (Reply Brief at 1). Respondent contends that if these decisions are followed, they may lead to direct annihilation of all the advertising and promotion programs under the Agricultural Marketing Agreement Act of 1937 (Respondent's Brief at 23). Instead, Respondent asserts that the applicable laws to be followed are the decisions of the Judicial Officer rather than the Ninth Circuit, even if the case is within the Ninth Circuit.

Respondent states that "government speech" is implicated by the activities of the Mushroom Council,

citing *Keller v. State Bar of California*, 496 U.S. 1, 12-13 (1990), in which the Supreme Court held:

> If every citizen were to have a right to insist that no one paid by public funds express a view with which be disagreed, debates over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

Moreover, Respondent relies upon *Lebron v. National R. R. Passenger Corp.*, 115 S. Ct. 961 (1995), in which the Court held that Amtrak was part of the government for the purposes of the First Amendment. Finally, Respondent argues that the Supreme Court has never recognized any First Amendment right not to be compelled to do commercial promotion or advertising, although the Court has held that there is a right not to be compelled to make ideological speech in such cases as *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); and *Wooley v. Maynard*, 430 U.S. 705 (1977).

I disagree with Respondent's contention that the decisions of the Ninth Circuit are not binding upon the Department of Agriculture in cases that arise in the Ninth Circuit. The only two cases in which the issue of whether the Department must follow a particular Circuit has arisen are *In re Sparkman*, 50 Agric. Dec. 602 (1991) and *In re Stamper*, 41 Agric. Dec. 1935, 1949 (1982). Admittedly, both cases apply to the Horse Protection Act and not to a marketing order. However, the fact is that the Department has followed the rule of the Eighth Circuit within the Eighth Circuit, although

it has chosen not to follow these cases outside of the Eighth Circuit. Similarly, I conclude that I am bound to follow the decisions of the Ninth Circuit within the Ninth Circuit.

Respondent's argument that government speech is implicated by the activities of the Mushroom Council was previously addressed in *United States v. Frame*, 885 F.2d 1131 (3d Cir. 1989). In *Frame*, the Third Circuit stated that there were "sound reasons" for concluding that the expressive activities financed by the Beef Promotion Act constituted 'government speech.' 883 F.2d at 1131-32. However, the court held ultimately that although a "close" question was presented, government speech was not implicated and the Beef Board was not part of the government for First Amendment purposes. *Id.* I believe that decision applies to the facts in this case.

It is true that the Supreme Court has never recognized any First Amendment right not to be compelled to do commercial promotion or advertising in the many cases it has decided pursuant to the First Amendment and in which the *Central Hudson* test has been applied. However, as I have previously determined, the Ninth Circuit in *Wileman* and in *Cal-Almond* has extended the Supreme Court decisions to this situation, and I am bound to follow those decisions.

Equal Protection Analysis

A second argument made by Petitioner is that the Act violates the Equal Protection clause of the Fifth Amendment by generally exempting producers who produce: 1) 500,000 pounds or less per year, 2) process mushrooms, or 3) export mushrooms (Petition at 6).

The Fifth Amendment contains an implicit Equal Protection component that prohibits the federal government from discriminating between individuals and groups. *Washington v. Davis*, 426 U.S. 229, 239 (1976) (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)); *United States v. Frame*, 885 F.2d 1119, 1137 (3d Cir. 1989). The general rule is that legislation is presumed to be valid and will be sustained if the statute's classification scheme is rationally related to a legitimate government interest unless the statute creates a suspect clarification that impinges upon a constitutionally protected right. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 444 (I985); *Cecelia Packing v. United States Dep't of Agric.*, 10 F.3d 616, 624 (9th Cir. 1993). The Equal Protection analysis requires a two-part inquiry: 1) whether the challenged legislation has a legitimate government purpose; and 2) whether the challenged classification is rationally related to that legitimate government purpose. Rational-basis scrutiny is "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). "All that is needed . . . to uphold the . . . [classification] scheme is to find that these are 'plausible,' 'arguable,' or 'conceivable' reasons which may have been the basis for the distinction." *Brandwein v. California Bd. of Osteopathic Examiners*, 708 F.2d 1466, 1472 (9th Cir. 1983) (internal citations omitted).

I. Legitimate Government Purpose

Congress declared that the purpose of the Mushroom Act was to strengthen the mushroom industry's position in the marketplace, maintain and expand existing markets and uses for mushrooms, and develop new markets and uses for mushrooms. 7 U.S.C. § 6101(b). I agree with Respondent that the "primary purpose of this legislation is to create a mandatory cooperative information and promotion program to maintain and expand the domestic fresh mushroom market for the financial benefit of producers and the industry." (Respondent's Brief at 10). The Supreme Court has recognized the legitimate governmental interest in creating other mandatory marketing order programs for "advancing the interests or producers" and to "raise producer prices." *Block v. Community Nutrition Institute*, 467 U.S. 340, 342 (1984). Moreover, as discussed above, the Ninth Circuit has held that there is a substantial and legitimate government interest in creating effective mandatory cooperative promotion and information programs to stimulate market demand for the financial benefit of the producers and the industry. *See Wileman*, 58 F.3d at 1378; *Cal-Almond*, 14 F.3d at 437. I, therefore, find that the government's purpose in strengthening the mushroom industry is legitimate.

II. Rational Relationship

The second step in the Equal Protection analysis is the determination of whether the exclusion of three specific groups of mushrooms or producers from the collection of assessments by the Mushroom Council is rationally related to the legitimate governmental purpose of strengthening the mushroom industry. Three

categories of mushrooms or producers are excluded from assessments. First, assessments under the Act only apply to mushrooms ". . . grown within the United States for the fresh market, or imported into the United States for the fresh market, that are marketed. . . ." Thus, the Act specifically excludes ". . . mushrooms that are commercially marinated, canned, frozen, cooked, blanched, dried, packaged in brine, or otherwise processed, as may be determined by the Secretary." 7 U.S.C. § 6102(9). Second, assessments under the Act only apply to producers and importers who produce or import ". . . on average, over 500,000 pounds of mushrooms" annually for the fresh market. 7 U.S.C. §§ 6102(6) and (11). Third, the assessments under the Act do not apply to exported mushrooms. 7 U.S.C. § 6144(g)(4).

A. Exclusion of Mushrooms for Processing

Mushroom growers receive $1.03 per pound for mushrooms sold in the fresh market, but only $.66 per pound for mushrooms sold for processing (RX 69, p. 16). This difference in return has increased significantly over the last thirty years; in 1966, the difference in price was only $.15 per pound. Similarly, in 1993, 69% of mushrooms were sold in the fresh market, and only 31% of mushrooms were used for processing (RX 69, p. 15). Since the fresh market is the most lucrative mushroom market, it is conceivable that Congress could rationally conclude that only fresh mushroom producers should be subject to assessments because such producers would receive the majority of the benefit from increased mushroom consumption and sales.

B. *Exclusion of Mushroom for Export*

In 1992-1993, total United States production of mushrooms for fresh use was valued at $537,922,000 (RX 69, pp. 12, 24). Exports of fresh mushrooms peaked in 1990 totaling only $22,000,000 (RX 43, p. 29). Thus, exports constitute approximately 4% of total United States mushroom production. Therefore, it is rational that Congress would choose to focus on the domestic market, thereby avoiding the administrative expense of worldwide marketing and distribution of promotional materials by the Mushroom Council.

C. Exclusion of Producers of 500,000 Pounds or Less

In 1993-1994, there were approximately 355 producers and a total production of 520 million pounds of mushrooms for fresh use (RX 69, pp. 9, 15). In 1995, the Mushroom Council collected assessments from 152 producers, who in total accounted for 515-518 million pounds of fresh mushrooms (Tr. 252). Therefore, there are approximately 203 producers who produce a total of 11-14 million pounds of fresh mushrooms per year. Such producers are excluded from the assessments collected by the Mushroom Council.

Presently, the Mushroom Council receives monthly reports and assessment checks from 152 producers, processes them, and keeps records for each producer (Tr. 257, 265). As noted by Respondent, if the identification and collection efforts for the 203 excluded producers were entirely successful, the Mushroom Council would receive an additional 535,000 per year based upon the computation of 14 million pounds times $.0025 per pound. Congress could have rationally concluded that the administrative costs associated with the collection

and identification of these small producers was not justified.

Since all three challenged classifications are rationally related to the legitimate government purpose of strengthening the mushroom industry, the Mushroom Act and Order fully comply with the Equal Protection clause of the Fifth Amendment.

Conclusions of Law

1. The Mushroom Promotion Program violates the First Amendment of the United States Constitution.

2. The Mushroom Promotion Program does not violate the Equal Protection requirements of the Fifth Amendment of the Constitution.

/s/ EDWIN S. BERNSTEIN
EDWIN S. BERNSTEIN
Administrative Law Judge

April 26, 1996

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

MPRCIA Docket No. 95-1

IN RE: DONALD B. MILLS, INC.,
A CALIFORNIA CORPORATION,
D/B/A/ DBM MUSHROOMS, PETITIONER

[Filed: June 12, 1996]

DECISION ON RESPONDENT'S MOTION FOR RECONSIDERATION

On April 26, 1996, I issued an Initial Decision in which I found that the Mushroom Promotion Program: (1) violates the First Amendment of the United States Constitution; and (2) does not violate the Equal Protection requirements of the Fifth Amendment of the Constitution. *In re Donald B. Mills, Inc.*, 55 Agric. Dec. ___ (MPRCIA Docket No. 95-1, Apr. 26, 1996).

On May 22, 1996, Respondent filed a Motion for Reconsideration that contended that the Initial Decision overlooked or misapprehended relevant points of law and fact. Respondent argues in its motion that: (1) the Initial Decision overlooked recently enacted relevant legislation; (2) the Initial Decision contains an improper legal analysis; and (3) Petitioner has abandoned its earlier arguments.

On June 3, 1996, Petitioner filed a response in which it opposed the Motion for Reconsideration.

On June 4, 1996, the American Mushroom Institute ("AMI") filed a Motion to Intervene in Support of Respondent's Motion to Reconsider for the purpose of filing an attached brief and participating in any oral argument pursuant to 7 C.F.R. § 900.57.

Section 900.57 provides, in part:

> Intervention in proceedings subject to this subpart shall not be allowed, except that, in the discretion of the Secretary or the judge, any person (other than the petitioner) showing a substantial interest in the outcome of a proceeding shall be permitted to participate in the oral argument and to file a brief.

The rules applicable to petitions to modify or be exempted from the Mushroom Act and Order, 7 C.F.R. § 1200.50 *et seq.*, specifically adopt and incorporate the provisions of 7 C.F.R. § 900.57 as a procedural rule applicable to Mushroom Act and Order petition proceedings. 7 C.F.R. § 1200.52(b).

Although there will be no oral argument with respect to the Motion, because AMI has a substantial interest in the outcome of this proceeding, it will be permitted to intervene for the purpose of filing its brief. The Motion to Intervene indicates that the American Mushroom Institute is a national, nonprofit trade association and that its membership includes more than 100 commercial-size mushroom farms in the United States representing over 90% of domestic mushroom production.

AMI asserts five arguments. First, since the Supreme Court granted the Solicitor General's Petition for Certiorari in *Wileman* on June 3, 1996, AMI argues

that I should vacate my Initial Decision and await further guidance pending the Court's resolution of the applicable First Amendment issues. Second, AMI contends that I should follow "official Department of Agriculture policy" as articulated by the Solicitor General in the Petition for Certiorari in *Wileman*, and revise my Initial Decision accordingly. Third, AMI joins in Respondent's argument that recently enacted legislation clarified Congressional intent with respect to the Mushroom Act and Order, the Agricultural Agreement Act of 1937, and other Federal commodity promotion laws. Fourth, AMI agrees with Respondent that Petitioner has abandoned its earlier arguments. Fifth, AMI reiterates First Amendment arguments that Respondent previously made and were considered in the Initial Decision. Since the latter arguments were discussed in the Initial Decision, they will not be discussed again in this Decision.

Upon reconsideration, I adhere to my Initial Decision for the reasons set forth in the Initial Decision and for the following reasons:

I. The Recently Enacted Legislation.

Both Respondent and AMI argue that the Initial Decision overlooked recently enacted relevant legislation. (Respondent's Motion at 2; Intervenor's Brief at 7). On April 4, 1996, the Federal Agriculture Improvement and Reform Act of 1996 ("the 1996 Act") was signed into law. Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888

(1996). Section 501 of the Act provides, in relevant part:

> (b) FINDINGS.—Congress finds the following:
>
> . . . .
>
> (3) The central congressional purpose underlying each commodity promotion law has always been to maintain and expand markets for the agricultural commodity covered by the law, rather than to maintain or expand the share of those markets held by any individual producer or processor.
>
> . . . .
>
> (9) While some commodity promotion laws grant a producer or processor the option of crediting individual advertising conducted by the producer or processor for all or a portion of the producer's or processor's marketing promotion assessments, all promotion programs established under the commodity promotion laws, both those programs that permit credit for individual advertising and those programs that do not contain such provisions, are very narrowly tailored to fulfill the congressional purposes of the commodity promotion laws without impairing or infringing the legal or constitutional rights of any individual producer or processor.
>
> . . . .
>
> (c) INDEPENDENT EVALUATION OF PROMOTION PROGRAM EFFECTIVENESS.—Except as otherwise provided by law, each commodity board established under the supervision and

> oversight of the Secretary of Agriculture pursuant to a commodity promotion law shall, not less often than every 5 years, authorize and fund, from funds otherwise available to the board, an independent evaluation of the effectiveness of the generic commodity promotion programs and other programs conducted by the board pursuant to a commodity promotion law. The board shall submit to the Secretary, and make available to the public, the results of each periodic independent evaluation conducted under this subsection.

§ 501, 110 Stat. at 1029-31.

Respondent argues that "Congress has stated that its goals are not, and have never been, the same as individual handler promotion goals and cannot validly be judged on any such comparative basis." (Respondent's Motion at 4-5). The 1996 Act recognizes that the goal of any commodity promotion program is to expand and enhance the market for the particular commodity that is being promoted, rather than the share of the market for any individual producer. Similarly, the Ninth Circuit in *Cal-Almond* and *Wileman* recognized that there was a substantial government interest in stimulating and expanding the overall market demand for almonds and peaches and nectarines, respectively. *Cal-Almond v. United States Dep't of Agric.*, 14 F.3d 429, 437 (9th Cir. 1993); *Wileman Bros. & Elliott v. Espy*, 58 F.3d 1367, 1378 (9th Cir. 1995). In the Initial Decision, I stated that "the government's interest in promoting and expanding the mushroom industry is substantial." (Initial Decision at 10). This analysis is not premised on the goal of expanding the share of an individual mushroom producer or handler, but on

increasing the overall demand for mushrooms in general.

Respondent further contends that Congress "clarified that the lack of credits for individual promotion of mushrooms does not detract from Congress' conclusion that the mushroom act is very narrowly tailored to fulfill Congress' purposes . . . ." (Respondent's Motion at 4). Although Respondent contends that the recent legislation was enacted "[u]ndoubtedly in response to the *Wileman* decision," (Respondent's Motion at 3), there is no indication in the legislative history of the 1996 Act that *Wileman*, *Cal-Almond*, or the Mushroom Council's program were considered by either the House or the Senate in enacting that legislation.

In the Initial Decision, I stated that "mushroom handlers do not receive credit for their own advertising and promotion efforts. Therefore, the Mushroom Council's program is not narrowly tailored. . . ." (Initial Decision at 15). A general statement by Congress which does not focus on the specifics of the mushroom industry and the Mushroom Council's promotion program does not change my analysis. Furthermore, deference to legislative findings cannot limit judicial inquiry when constitutional rights are involved. *See, e.g., Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 129 (1989).

Finally, Respondent contends that Congress described in the 1996 Act the proper time for measuring the effectiveness of a commodity promotion program. (Respondent's Motion at 6). Although Congress established five years as the appropriate time period for each commodity board to conduct an independent evaluation of program effectiveness, it did not say that the courts

could not evaluate a program before that time to determine constitutionality.

II. The Correct Analysis Was Applied.

Respondent's second argument is that, assuming *arguendo* that *Wileman* should be followed, the Initial Decision overlooked or misapprehended that the proper comparison to make in determining whether the direct advancement prong of *Central Hudson* has been satisfied "is between the Council's promotion program and a producer's promotion program." (Respondent's Motion at 6). In *Wileman* and *Cal-Almond*, the assessments were made upon handlers, not producers. As found in my Initial Decision, however, "[a]ssessments under the Mushroom Promotion, Research, and Consumer Information Act, and the Mushroom Promotion, Research, and Consumer Information Order are levied on fresh mushroom producers and importers . . ." (Finding of Fact 18).

On page 13 of the Initial Decision, I stated:

> The Department has demonstrated that advertising increases consumption of mushrooms. However, the Department has not shown that the efforts of the Mushroom Council are better at increasing consumption than the individual efforts of the mushroom *handlers*. None of the government witnesses could substantiate that any part of their program increased sales of, demand for, or the price of mushrooms, nor could they show that new markets had been expanded, new uses had been found, or that the program strengthened the mushroom industry's position in the marketplace (Petitioner's Brief at 17). Thus, the Mushroom Council's program

> has not "directly advanced" the government's interest and fails the second part of the *Central Hudson* test.

(emphasis added).

Clearly, the second sentence of this paragraph refers to handlers, not producers of mushrooms. However, the statement applies equally to producer-handlers of mushrooms, of which Respondent contends there are currently 59. (Respondent's Motion at 7).

Respondent contends that producers of mushrooms do not engage in promotion. However, the evidence indicates that Petitioner, a producer-handler, is engaged in personal selling techniques by meeting with produce managers and buyers to maintain existing markets and to develop new markets. Such personal selling is done in face-to-face meetings and telephone calls to produce brokers, buyers, and managers. Petitioner argues that the amounts of money that it must pay to the Mushroom Council reduce the money that it can devote to personal selling. (Petitioner's Response to Pre-Hearing Order I at 8). Petitioner also argues that if it did not have to pay the assessment, it would install new air conditioning, allowing for increased production and an even better quality product. (Petitioner's Brief at 12-13; Tr. 746-47).

To the same effect, Petitioner presented evidence that Pictsweet Mushroom Farms, a large producer-handler of mushrooms, engages in substantial promotion. Pictsweet does many things to increase the sale of and demand for mushrooms: (1) providing personal service; (2) using its sales force to contact customers directly; (3) developing merchandising plans for

customers; (4) providing paper bags in grocery stores because mushrooms last longer if they are stored in paper bags; (5) engaging in promotion and advertising programs with retailers; and (6) providing recipes for retailers to distribute to consumers. (Tr. 615-17). Pictsweet also provides promotional material to retailers, price discounts when retail stores put mushrooms on sale, and money for joint advertising. (Tr. 617-19). John Haltom, Pictsweet's president, testified that Pictsweet's individual advertising and promotion efforts have been successful in increasing the sale of mushrooms. (Tr. 640).

In the Initial Decision, I stated that "although the public relations and educational programs run by the Council were performed very well, the Council has seen no measurable benefit in increased sales of mushrooms as a result of these programs (Tr. 648-49)." (Initial Decision at 13). Because the evidence has not shown that the Mushroom Council was better able to promote and increase consumption of mushrooms than such producer-handlers, or to increase consumption at all, the Mushroom Promotion Council's program has not been shown to directly advance the government's interest in stimulating and expanding the mushroom industry.

III. Petitioner Has Not Abandoned Its Earlier Arguments.

Respondent and AMI argue that Petitioner has abandoned its earlier arguments by stating in an *amici curiae* brief submitted to the United States Supreme Court in *Wileman* that "[t]he Ninth Circuit decision is not binding on any other governmental mandatory promotion and advertising program, whether it be a

federal program or a state program—as the federal or state government, respectively, can make a showing that other agricultural programs meet the *Central Hudson* test. . . ." (Respondent's Motion at 8-9; Intervenor's Brief at 11-12). Petitioner has not conceded that *Wileman* is inapplicable to all promotion programs; Petitioner has merely stated that each promotion program must be evaluated on its individual facts.

IV. The Initial Decision Need Not Await Further Guidance From The Supreme Court.

AMI contends that I should vacate my Initial Decision and await further guidance from the Supreme Court, which on June 3, 1996, granted the Solicitor General's Petition for Certiorari in *Wileman. Glickman v. Wileman Bros. & Elliott, Inc.*, 58 F.3d 1367 (9th Cir. 1995), *cert. granted*, 64 U.S.L.W. 4675 (U.S. June 3, 1996) (No. 95-1184). (Intervenor's Brief at 2). On May 20, 1996, the Solicitor General also filed a Petition for Certiorari seeking review of the *Cal-Almond* decision, but asking the Court to withhold action pending the resolution of the First Amendment issues in *Wileman. United States Dep't of Agric. v. Cal-Almond, Inc.*, 67 F.3d 874 (9th Cir. 1993), *petition for cert. filed*, 64 U.S.L.W. 4584 (U.S. May 28, 1996) (No. 95-1879). In support of this argument, AMI states that the Judicial Officer issued an Order to Show Cause why he should not "forestall" his Decision and Order and await "the outcome of proceedings for judicial review of *Wileman* and *Cal-Almond*," in a second *Cal-Almond* case currently on appeal within the Department. ("*Cal-Almond II*").

I believe that it would be counterproductive to judicial efficiency to vacate and/or stay the Initial Decision. Unlike the Judicial Officer in *Cal-Almond II*, I have already considered the arguments presented by Respondent and Petitioner and issued a written decision in this matter from which an appeal to the Judicial Officer already has been filed. Upon appeal, if the Judicial Officer wishes to stay this matter pending resolution of the First Amendment issues by the Supreme Court in *Wileman*, then both *Cal-Almond II* and the instant case can be stayed at the same level.

V. The Solicitor General's Position Is Not Controlling.

AMI argues that the legal position of the Secretary of Agriculture with respect to the issues involved in the instant case is clearly set forth in the Solicitor General's Petition for a Writ of Certiorari in *Wileman* and that I am bound to follow this position. (Intervenor's Brief at 7). Although the Solicitor General filed a Petition for Certiorari in *Wileman* on behalf of the Department, it is unclear that the Solicitor's brief represents official Department policy rather than the position of the Office of the General Counsel.

As an administrative law judge, it is my duty to decide cases in accordance with applicable legal authority. In the instant case, until such decisions are reversed or modified, the Ninth Circuit decisions of *Wileman* and *Cal-Almond* must be followed. Based upon the analysis required by these cases—the application of the *Central Hudson* test to the Mushroom Council's program—I have found that the Mushroom Council's program violates the First Amendment.

The Office of the General Counsel, representing USDA, is a litigating party in all cases that are heard and decided by United States Department of Agriculture administrative law judges. Nevertheless, the function of administrative law judges in this Department, as well as in all other departments and agencies throughout the federal government in which the departments and agencies are parties, is to impartially adjudicate the issues rather than automatically adhere to the views of the departments and agencies who are litigating parties. Anything less would undermine the very essence of the Administrative Procedures Act and its concept of independent federal administrative law judges.

Accordingly, upon reconsideration, I affirm my Initial Decision.

/s/ EDWIN S. BERNSTEIN
EDWIN S. BERNSTEIN

June 12, 1996 Administrative Law Judge

UNITED STATES OF AMERICA

DEPARTMENT OF AGRICULTURE

HEARING

MPRCIA No. 95-1

IN RE: DONALD B. MILLS, INC.
A CALIFORNIA CORPORATION,
D/B/A/ DBM MUSHROOMS

VOLUME I

U. S. Tax Courtroom 2-1350
Federal Building
450 Golden Gate Avenue
San Francisco, California

Tuesday
August 15, 1995

The hearing was convened, pursuant to Notice, at 9:00 a.m.

BEFORE: EDWIN S. BERNSTEIN,
Administrative Law Judge

[Testimony of Wade Whitfield]

* * * * *

[1-276]

Q Is there a surplus of fresh mushrooms?

A Is there a surplus of fresh mushrooms?

Q Yes.

A No, I couldn't say there was a surplus of fresh mushrooms. There might—the term might be "an adequate supply."

Q The term might be an inadequate supply?

A An adequate supply.

Q So there is not a problem with mushrooms with respect to overproduction of mushrooms. Correct?

A I don't think there is at this time, an overproduction. There's a possibility of being; . . .

* * * * *

[1-294]

Q Does the Council have any statistics showing that there was any increase sales of mushrooms as a result of that Let Your Love Mushroom campaign?

A I don't have my production volume sheet here with me. The only knowledge I have is one of our cou[n]cil members did say that, in his analysis, it did

increase consumption. It did increase, and that's the only thing I heard.

Q Now—

A We have no documentation.

* * * * *

UNITED STATES OF AMERICA

DEPARTMENT OF AGRICULTURE

HEARING

MPRCIA No. 95-1

IN RE: DONALD B. MILLS, INC.
A CALIFORNIA CORPORATION,
D/B/A/ DBM MUSHROOM

VOLUME II

U. S. Tax Courtroom 2-1350
Federal Building
450 Golden Gate Avenue
San Francisco, California

Wednesday
August 16, 1995

The hearing was convened, pursuant to adjournment, at 9:00 a.m.

BEFORE: EDWIN S. BERNSTEIN,
Administrative Law Judge

[Testimony of Wade Whitfield]

* * * * *

[2-320]

Q And do you know what that quantity is then?

A Of what?

Q Of processed mushrooms for 1995?

A I could give you a round number without having a document in front of me.

Q A round number is fine.

A Okay. Fresh market is a round number of 500 million pounds.

Q Okay.

A Processed market is about 250 million pounds.

Q Okay. And was the same ratio or the approximately same ratio true in 1994?

A I'm sure it was.

Q Okay.

A Very close probably.

Q Has the Council conducted any studies to [2-321] determine the price differentiation between the processed price and the fresh price?

A No.

Q Has the Council conducted any studies to determine whether or not an increase in the price of

fresh mushrooms will increase or decrease the price of the processed mushrooms?

A No, we haven't.

Q Now the 500 million pounds that you estimate—the 518 million pounds that you estimate for 1995, that does not include the production from producers who produce less than 500,000, correct, 500,000 pounds?

A It does not include that.

Q Now when was it that you began your "Blueprint for Profit" that you discussed yesterday? Respondent's Exhibit 72.

A Well, we started production of it early in the year of '95, but we sent it out and announced it about the middle of May.

Q Of 1994?

A 1995.

Q 1995. Okay.

A This year's program.

Q So it was sent out to the retailers in [2-322] approximately 1995? I mean in May of 1995?

A Yes.

Q Okay. And what was the cost of that project?

A The initial cost was $60,000 to produce all of the materials and get it to the producers and to the retailers.

Q Now was that $60,000 cost—did that include any firms that you hired to come up with that program?

A Yes.

Q Okay. And how much was paid to that firm if you can recall?

A Well, we used them for two or three projects all together.

Q Okay.

A I would estimate somewhere between a $7,000 and $10,000 consulting fee. It falls back into the 10 to 15 percent category that I talked about yesterday.

Q And did those originally just go out to the retailers or retailers and handlers?

A They were sent to the producers first—

Q Okay.

A —which includes handlers.

[2-323]

Q Okay. So they were sent to the producers and then there were more packages made and sent out to producers or retailers?

A To retailers.

Q Okay. And approximately how many were sent out?

A We have a 250 list for producers/handlers in the industry of people who are interested in getting our

materials. We have a 520 number list of retailers around the U.S., so I think that would be somewhere in excess of 750 kits.

Q Then there was—I think you testified that almost 70 more stores ordered more?

A Store groups.

Q Store groups. Representing about 15,000 stores?

A That's close. Yes.

Q And you said that there's approximately 30,000 stores in the United States?

A 30,000 supermarkets. I think there's 30,000-35,000 —somewhere in that area throughout the United States.

Q Okay. But that does not include—well, what's the opposite of store chains? You know, the mom and pop—

[2-324]

A The independents?

Q The independents. Does your 30,000 figure—does that include the independents?

A No, that does not include the independents.

Q Do you know approximately how many stores there are in the United States that carry produce?

A I'm not certain, but it would have to be at least 15,000 or more.

Q Okay. Now based upon this mailing in May of 1995, did you see any increased sales as a result of that promotional effort in May of 1995?

A We sent it out—it was late May by the time it reached the retailers. If anything had happened it would have happened in June. We do not receive our assessments until—for June until the end of July, so our last report would have probably been the one that might have reflected some increase or whatever. But I —to be honest with you I have not studied it.

Q Okay. So as you sit here today you don't know if that program increased consumption?

A No. Anything I'd say would be an assumption.

Q Does the Council keep track of the [2-325] prices?

A No.

Q The prices that fresh mushrooms are sold. Does the Council keep track of what price retailers are charging for the mushrooms?

A Only in the relatively small study that we're doing with six major retailers around the U.S. That's the only data gathering that we're doing at this time.

Q Now has the Council conducted any research or gotten a hold of any research showing the nutritional value of mushrooms?

A Yes. There was a study done several years ago about the nutritional values of mushrooms that was

approved by the FDA for use. In fact, you could use it on labeling.

Q Okay. And it's claimed, is it not, that there is no fat in mushrooms?

A Yes, that's correct.

Q And there is no cholesterol in mushrooms?

A That's correct.

Q There's no sodium in mushrooms?

A Correct. And you're allowed to declare that.

* * * * *

[2-327]

Q Okay. Is there any claims made by the Mushroom Council in its consumer educational program talking about whether mushrooms are healthy?

A Yes. Yes, I'm certain there are.

Q Are there any claims in your promotional material to consumers that mushrooms are nutritious?

A If there are it would be very, very minor as far as nutritious.

Q Why would it be very, very minor?

A Because it's a fact.

Q Because what?

A It's a fact. I've always said that what mushrooms —the best of what they have is what they don't have. They have very few calories. They have no sodium, no fat, and no cholesterol.

Q Besides the fact that they don't have the bad things, what you're saying is they really don't have the good things either?

A They have some, but it's—it's on a [2-328] minor level.

Q You're aware of the fact that there's a lot of produce in the market that a consumer can buy that is much more nutritious for the consumer?

A I'm not certain of that. I—I've only had experience with lettuce as far as fresh produce is concerned.

Q I believe you also testified that there was a research project that you entered into with—was it Rutgers?

A Yes.

Q Okay. And that was to see if you could get Bravo approved as a—or to keep Bravo approved as a pesticide or herbicide?

A It was done to do more research and establish more data so that—the hope would be that they could get a final registration on Bravo for use on mushrooms.

Q And it's a fact that Bravo is not allowed for use in California, isn't that correct?

A I'm not sure of that.

Q What is the greatest fresh mushroom producing region in the United States?

A Pennsylvania.

Q Okay. And approximately what percentage [2-329] of the fresh mushroom production is in Pennsylvania?

A According to the statistics we see from the government it's about 43 percent.

Q And California is second?

A Yes.

Q And approximately what percent is California?

A I think in the last number I saw it was 17 percent.

Q So you have approximately 60 percent of the mushrooms grown in two states?

A That's correct. Fresh mushrooms.

Q Now if I have these numbers correct, you have identified 152 mushroom producers that are subject to the assessments?

A That we have identified, yes.

Q Okay. You have so far on file 59 exemptions. 59 known producers for exemptions, because they produce less than a half a million pounds, correct?

A According to the applications they sent to us. Yes, that is correct.

Q Now has the Council done any work just to make sure that those people that have filed exemptions are producing less than a half a million pounds?

[2-330]

A At this point, no.

Q You believe though that there are some mushroom producers that you still haven't found?

A I'd say the possibility exists.

Q Okay. From what I learned yesterday from you there are 43 out of the 152 are producer and handlers, correct?

A That's correct.

Q And 16 that are handlers only?

A That's correct.

Q And if I understand that to mean it is that they market fresh mushrooms, but they grow none of their own?

A That's correct.

Q Now do you have any figures as to these 43 that are producers and handlers—how many of those 43 also purchase from other producers?

A No, I don't have that information.

Q Now is a company required to file exemptions with the Council if they are exporting fresh mushrooms?

A No.

* * * * *

[2-514]

Q Now in your opinion in being involved with agricultural products for the last 20 or so years, is there very much nutritional value to mushrooms?

A No, however I think by virtue of the fact that they don't contain—the things that they don't contain —mushrooms have value. And by that I mean mushrooms are low in sodium, low in fat, low in cholesterol, and they have some fiber, but they have a good story because they aren't harmful, and they're perceived to be good for you.

Q But mushrooms don't show up on any USDA pyramid charts as being promoted to be consumed by the American public on a weekly basis?

A No.

Q Then you are aware that there are many other vegetables that people can buy in the produce section that are much higher in nutritional value and still don't have the bad things—the fat and cholesterol?

A Yes.

[2-515]

Q And are a number of those vegetables that you can buy in the produce section that are much higher in nutritional value than mushrooms, are there some of those that don't have a mandatory promotional program?

A Yes.

* * * * *

[Testimony of Robyn Wilk]

[2-518]

Q Does the Mushroom Council to your knowledge have any information that any of the programs that have been completed in 1995 has increased the consumption of mushrooms?

A No.

Q Nothing that shows any increased sales in mushrooms?

A No. We're not in the business of sales.

Q I think on the public relations portion you said that there was approximately 850 newspapers that you sent this information to?

A Right. Correct.

Q And I do believe you stated that there's no assurances and there's no guarantees. Do you know how many ran your promotional material of the 850 you sent them to?

A Well, we have a press clipping service that sends back clips to us, which would suggest what kind of pickup we're getting. We subscribe to that [2-519] service through the use of our public relations agency.

At best a clipping service will tell you that they only can generate and hope to provide you about a 30 percent response in terms of what's really happening out there.

Q So this service that you subscribe to—did they give you any information as to how many of the 850 newspapers ran this promotional piece?

A No, not yet, and I expect that we'll have more of that information available at the end of the year when we have a year-end summary of our activities from the agency. We're not there yet.

Q Now one of the things that you mentioned, and I'm having difficulty understanding what it was—you said that all of the studies had been completed and they were reported at the July meeting. Which studies were those?

A Oh, excuse me.

Q I know you said it. I just didn't pick it up.

A Jim Degan, who again was the consultant the Mushroom Council retained to conduct the foodservice studies, reported on the findings of the two major studies that have been done subsequent to [2-520] the internal assessment, which was completed last Spring. Between Spring and the Board meeting at the end of July there were two additional studies completed, the pizza study and the distributor study—foodservice distributor study. Both of those studies were reported on at the July Board meeting in Chicago.

Q And one of those studies indicated that in 1990 there was a substantial downturn in the foodservice business? And then it picked back up again?

A Well, the foodservice industry has suffered like many other industries as a result of the economy. When people don't have as many available dollars to spend the foodservice industry suffers because that affects their pockets when people don't eat out as much.

Q And the Mushroom Council has determined that the foodservice industry is very important to fresh mushrooms?

A The producers and people within the Mushroom Council themselves, yes, have determined that they see that as a very—potentially a very—an active market currently, and one that they very much wish to pursue.

[2-521]

Q With pizza amounting to about 30 percent of the mushroom business for foodservice?

A No. I didn't say pizza. I said that the studies indicate that approximately 30 percent of their fresh production—they feel—goes into that whole area called foodservice, which would also encompass pizzas as one segment of it.

Q But do you recall that the foodservice industry had their downturn beginning in 1990 based upon one of the reports here?

A I don't have any recollection of that.

Q Now with respect to Exhibit 79, the Cyberspace where people send in recipes, and the winner will—or there maybe—is there just one winner?

A Three winners.

Q Three winners. And each would receive a $10,000 savings bond?

A No. That's the total.

Q Okay.

A Upon maturity.

Q Okay. And do you know how many recipes have been submitted as a result of that?

A I understand so far a couple of hundred. We still have till the end of September for the cutoff [2-522] date.

Q And I take it the Mushroom Council is putting up the entire $10,000 savings bond?

A That's correct.

Q The—Exhibit 81 is the magazine, the "Meals in Minutes"?

A Right.

Q And when did that come out?

A That came out in June of 1995.

Q Do you know in response to this June publication whether or not sales—fresh sales—of mushrooms in July were—did they have an increase?

A I have not heard any figures to reflect that.

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UNITED STATES OF AMERICA

DEPARTMENT OF AGRICULTURE

HEARING

MPRCIA No. 95-1

IN RE: DONALD B. MILLS, INC.
A CALIFORNIA CORPORATION
D/B/A/ DBM MUSHROOM PETITIONER

VOLUME III

U. S. Tax Courtroom 2-1350
Federal Building
450 Golden Gate Avenue
San Francisco, California

Thursday
August 17, 1995

The hearing was convened, pursuant to adjournment, at 9:00 a.m.

BEFORE: EDWIN S. BERNSTEIN,
Administrative Law Judge

* * * * *

[3-592]

JOHN HALTOM

was called as a witness by the Petitioner and, having been first duly sworn, was examined and testified as follows:

JUDGE BERNSTEIN: Please state your full name and address.

THE WITNESS: John Haltom, H-a-l-t-o-m, [3-593] 3701 Brownsville Highway, Jackson, Tennessee 38301.

JUDGE BERNSTEIN: Thank you.

MR. LEIGHTON: Good morning, Mr. Haltom.

THE WITNESS: Good morning.

DIRECT EXAMINATION

BY MR. LEIGHTON:

Q What is your current position?

A My current position is I am President of Pictsweet Mushroom Farms, which is an operating division of the United Foods, Inc.

Q Does the court reporter have this down? Could you spell Pictsweet?

A She has my business card.

Q Okay. And then for the court, then?

A P-i-c-t-s-w-e-e-t.

JUDGE BERNSTEIN: Thank you.

BY MR. LEIGHTON:

Q And how long have you occupied that position with Pictsweet?

A Since October of 1991.

Q And has your position changed any time during that period of time?

A No, it has not.

Q And, prior to being the president of Pictsweet, what was your position?

[3-594]

A I was Director of Inventory Planning and Distribution for Pictsweet Frozen Foods.

Q And how is Pictsweet Frozen Foods connected with United Foods?

A Pictsweet Frozen Foods is an operating division of United Foods, just as Pictsweet Mushroom Farms is.

Q And how long has Pictsweet Frozen Foods been in business?

A Pictsweet Frozen Foods started 50 years ago, 1945, as a strawberry processor with a single-plant operation in Bells, Tennessee.

Q And how has Pictsweet grown since then?

A Well, it started out just freezing one single product, strawberries, and selling them to wholesalers for distribution to drug stores like Walgreen's, when Walgreen's had a soda fountain. It's progressed from that point to its current size today.

Q And approximately how many different foods does Pictsweet distribute?

A Pictsweet Frozen Foods is only in the frozen vegetable business and it has thousands of stock-keeping units. And it is a vegetable product that is to be frozen, its product line, from asparagus to zucchini.

[3-595]

Q And there are how many SKUs?

A Thousands, 3000.

JUDGE BERNSTEIN: What's an SKU?

THE WITNESS: Stock-keeping unit.

JUDGE BERNSTEIN: Thank you.

BY MR. LEIGHTON:

Q And that's how you keep track of what you have in inventory and what you sell?

A On the frozen food side.

Q Now does Pictsweet have something other than frozen foods?

A Pictsweet Mushroom Farms.

Q Okay. How long has Pictsweet Mushroom Farms been in existence?

A Since October of 1987.

Q And how long were you with—when did you start with United Foods?

A 1976. So next year will be 20 years.

Q Now you stated that your position was with United Foods; what were your job responsibilities?

A With Pictsweet Frozen Foods?

Q Yes.

A Started out as a transportation analyst in the Distribution Department and wound up [3-596] responsible for total distribution of all frozen foods, buying all components that the company did not produce in their own plants, procurement of all packing materials and other sundry items, planning inventory, scheduling production, customer service.

Q Now could you state what your job responsibilities are with respect to your fresh mushroom division?

A Our mushroom is structured as three separate business units. We have a mushroom farm in Ventura, California; we have a mushroom farm in Salem, Oregon; and we have a mushroom farm in Fillmore, Utah.

Each mushroom farm is a separate business entity and each farm has a general manager. And the general manager has a staff that allows him to perform all the duties that any independent business would have to perform. Each farm is a profit center.

And my responsibilities are to give those three farms direction, to motivate them, to hire good people, to measure their results, and stay out of their way.

Q Now other than with respect to each of those separate farm entities, what else is your job position with Pictsweet?

A We're an operating division. I have [3-597] profit and loss responsibility for Pictsweet Mushroom Farms. I report to the Board, I report to the President, and I make quarterly reports to our Board of Directors.

Q Now what is your educational background?

A I have a bachelors degree from the University of Tennessee, Knoxville, and I've done graduate work at Georgia State University.

Q And in what area of education?

A Transportation and marketing.

Q What is the most profitable food product sold by Pictsweet?

A On a per-pound basis?

Q Yes.

A Mushrooms.

Q Mushrooms?

A Mushrooms, without a doubt; the category mushrooms would be our most profitable item.

MR. LEIGHTON: When I ask you questions, if you find that it is too proprietary to answer, please let me know so we—

THE WITNESS: Sure.

MR. LEIGHTON: I do not want to ask you any proprietary information that you don't want to provide.

[3-598]

THE WITNESS: Sure.

BY MR. LEIGHTON:

Q But approximately what percent of Pictsweet's business is mushrooms?

A Twenty-five percent.

Q And what percentage of Pictsweet's mushrooms are sold fresh?

A Fresh market is difficult to measure because, when you market mushrooms, you have to market the total crop. Our largest customer is a manufacturer of a meat substitute where mushrooms would be the primary ingredient in that meat substitute. We sell that one account, that one customer, one ship-to location, over 100,000 pounds a week. That's processed.

We, in total, sell about 50 percent of our total volume to retailers and the other 50 percent goes to processors such as the meat substitute manufacturer. We also have the ability on certain days of the week, because it must be marketed and sold daily—mushrooms must be marketed and sold daily—of

having to, at times, go to the processor of what I call last resort.

Mr. Reitnauer is a processor; his company's a processor. They post a price. If you . . . .

* * * * *

[3-600]

mismanaged. The owners had some personal legal problems, financial difficulty. They didn't own this business very long and, when we bought it, it was in bankruptcy and the facilities had been run down and mismanaged. In fact, the customer base was basically gone.

When a product company or mushroom farm physically goes out of business, those customers have to go somewhere else to buy their mushrooms. When you go back in business, you have to rebuild that credibility, you have to rebuild that reliability and that trust. And it's almost—sometimes I think it takes generations to completely erase such bad experiences as happened to our customer base.

We've been fortunate enough that we've been able to overcome it completely and have been doing quite well in the mushroom business from the first month. We were profitable the first month and we've been profitable since then every quarter.

Q So they bought these mushroom farms in 1987, you began being in charge of that mushroom business in 1991?

A Uh-huh—yes.

Q Have your sales increased every year since then?

[3-601]

A Yes, they have. Since 1991—I might add, since 1991, our business is up 25 percent in pounds. So our prices are higher, our revenues are higher, and our profit since 1991 has more than doubled.

Q You heard Mr. Moss testify the day before yesterday there was a decline in consumption from 1990 to 1993. Did Pictsweet feel that?

A In the markets that we serve—you must understand that we don't sell to a national market, we sell to regional markets. You can't ship mushrooms long distances, they have a very short shelf-life. The more they're handled, the more they bruise, and the quality is reduced substantially after the pick.

Our markets have shown continued growth, individually and collectively. Now there are blips in that; the Los Angeles market has been a tough market, you've had natural disasters, you had riots, you had a recession, you had defense industry cutbacks. I mean, that's been a tough market.

Q You had an earthquake down there, too.

A Earthquake, I think it's a natural disaster.

Q Could you describe, and perhaps in the following order, how mushrooms are grown, marketed,

* * * * *

[3-606]

A Well, they don't insist on it because they can get it from everyone else. But, because we can provide it, what the retailer can do is order this morning and then revise his order before noon in order for us to get it on the truck to deliver in the evening. So we allow—we provide the service to the retailer that they can fine-tune their inventory every day to match their sales requirements at their stores.

Q Now, if a mushroom is picked today in Ventura, delivered to an L.A. supermarket today, is it on the shelf by tomorrow usually?

A Usually on the shelf by tomorrow; that's right.

Q Your retailers that you deal with, how long will they allow product to sit on the shelf that hasn't sold?

A It's not how long they will allow it, it's what will the product look like. And they will take some action after a certain period of time—they've got several options. One is, they reduce the price on their own to move it. Or they will throw it in the trash.

Now the fact that we're there every day reduces their shrink; and their shrink is what they throw in the trash.

[3-607]

Now they told me that mushrooms have about seven percent shrink. Now the retailer eats the shrink. Anything we can do to reduce that shrink increases their margins, provides a better quality product, and cements the relationship that we have with that buyer and with that chain.

Q And is part of the reason why you want to provide that same-day service is the fact that the customer can buy a smaller amount, knowing he can buy another amount the next day?

A That's right.

Q So he doesn't have the shrink and it looks like it's one- or two-day-old mushrooms?

A And doesn't have the inventory investment, which is very important. Inventory turns are a critical measurement of buyers of any item at retail but, for these buyers, about the same token.

Q Okay, can you explain that inventory turn?

A Well, how much inventory do they sell—I mean how much product do they sell and how many pounds do they have in inventory. If they are turning inventory every day, they would get 365 turns per year. If they turn it once a week, they get 52 turns per year. Obviously, the more turns the less [3-608] investment they have at any point in time.

Q Does Pictsweet have its own transportation?

A We sure do. The drivers are an integral part of the service factor. We own our own trucks, the drivers are employees. And the drivers are like every other employee in every one of our farms, they are sharing in the profit. Twenty percent of the profits are distributed to the employees every quarter So the drivers have a vested interest in, not only their jobs, but their quarterly bonus. And their quarterly bonus has been in double-digit percentages on some quarters.

It's been very much part of our service and marketing factor is to have these drivers, as well as the other employees, dedicated to providing the best level of service every day, every week, every month.

Q Does Pictsweet sell any mushrooms east of the Rockies?

A No, we can't transport mushrooms all distances; no one can very well for two reasons. One is the quality, the shelf life. Long transit times increases the bruising, it also costs more money.

Mushrooms have a density factor. You [3-609] take a 45- or 48-foot refrigerated trailer, which is what most of the over-the-road trailers are, 22,000 pounds, as opposed to frozen vegetables at 45,000 pounds. So your transportation costs on a per-pound basis are very high.

Q Since you got into the business in 1991, has the cost of production of mushrooms per square foot decreased?

A Well, I can only speak for—

Q Okay.

A And ours has dropped dramatically. There's several reasons for it. Yield is the primary driving force behind the cost. You have the same input cost and the more you get out of those inputs, the less your cost per pound is.

If you get three pounds per square foot, or you get six pounds per square foot, the only difference is picking and packing, everything else is the same. Also, our costs are down dramatically because our profit-

sharing program has reduced our Workmens' Compensation expenses, Workers' Compensation expenses.

That's been a very big problem in California and we have been able to focus our employees on the fact that they have a vested interest [3-610] in helping us provide a safer workplace. So the combination of those factors have driven our costs down dramatically.

I don't know if everyone else can say that or not. If they can't, they are missing a great opportunity.

Q During the time that you've been in business, have better varieties come out?

A Yes, the strains; the spawn-makers are working to provide spawn that has higher yields and better quality. But they can only do so much and, once they deliver that spawn, then the grower has to take that spawn and, with good management and growing techniques, take it the rest of the way.

Q Do you believe, over the four-plus years that you've been there, that the quality has increased?

A The quality definitely increased. As we've invested in our farms, we've invested in those things which improve quality, air-handling capability, cooling capability, transportation capability.

Q Have you found that that increased quality causes retailers to pay more money and buy more product?

A It's caused retailers to be pleased with [3-611] the service we provide, the quality we provide, and it's been good for the consumer.

Q You touched on it a little bit, the one that makes that vegetarian burger, but could you describe the types of markets serviced by Pictsweet in the fresh market?

A We get to market total crops. And, when our harvesters are in the growing rooms picking, they make on-the-spot determinations of size and of quality, large and mediums—I'm sorry—jumbo and large, medium and small, and then No. 2 product. So you've got a range of quality right off the beds that you have to deal with.

And then, when you go through the packing process, it's also a sorting process, and you accumulate more product that is what we refer to as No. 2. That's not a USDA number, that's our—that's an industry standard but it's not USDA-driven. So you have to deal with that entire product.

Our predominant market is the retail market and it's that way because we've got Pictsweet frozen foods in the frozen vegetable cabinet, we've got Pictsweet mushrooms in the produce cabinet, we can do cross-merchandising between the two. We do—the wholesale market is a good market for us. The [3-612] foodservice figures is a good market for us. The process market, for those who are taking the mushrooms and commercially cooking or freezing or brining or—that's a good market for us.

Now, it's not a good market for us if we have to go to the mushroom use of last resort.

Q When you're talking about these other process markets, you're not talking about the 35-cents-a-pound stuff that Mr. Cirini was talking about?

A Only the last resort.

Q Okay. The other process market that you're talking about was—describe that again, the ones that are freezing, cooking?

A Well, we have a customer—I mentioned it earlier, I go back to that one—we have a customer in the northwest who takes mushrooms and makes a meat substitute and that meat substitute can be a burger, it can be taco mix, it can be sausage; they change the seasonings but it's basically our mushrooms, brown-rice, onions, and spices.

They are very successful. It's extremely successful and we're going with them. They want to triple their business in the next three years and they want us to tell them next week how we're going to supply them with three times the amount of mushrooms

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[3-615]

— he's not going to do it.

BY MR. LEIGHTON:

Q Can you describe what Pictsweet does to help Pictsweet increase sales?

A That's our business, increase sales.

Q Whether we call it advertising, promotion, whatever, whatever you do to help Pictsweet sell more product.

A Demand—we want to increase the amount of pounds that we sell and increase the amount of revenue that we receive for those pounds.

Well, it's an all-inclusive process. I don't know how you say that it's just this and just this and just this. It includes everything we do.

We preach two things to our employees: Take care of the crop and take care of the customer. That's why we have an incentive program at the farm, that's why the profits are shared, that's why we control our transportation, that's why we have a direct sales force—we don't have brokers, we have a direct sales force. That's why the customers talk directly to our sales force, they don't talk to a third party, they don't talk to intermediaries, they talk directly to our sales force. That's why we're structured as individual business units and not one [3-616] large mushroom growing entity, but three separate mushroom growing entities.

That's why we deliver every day of the week; that's why we'll deliver twice to some markets that the markets require, like Fridays in Los Angeles, we'll make two deliveries a week—a day.

We work with the retailer, we work with the wholesaler, we structure a marketing and merchandising plan for each individual customer. No two customers are alike. Some retailers have an every-day low price strategy, some have a promotion program. If

they have a promotion program, we give them rotating programs, cents-off.

I believe Reitnauer yesterday called it off-invoice allowances. Well, we—it's a price reduction, that's all it is. We do all of that. We provide promotional material, we provide point-of-sale materials, we provide paper bags because mushrooms are stored—the shelf life is longer if they're stored in a—hold them in the refrigerator in a paper bag rather than the plastic roll that's at the supermarket.

There's many ways to promote the sales and increase the volume.

Q Now the promotional material that you [3-617] provide to the retailer, is that promotional material that Pictsweet paid for?

A Well, we've had our promotion material since we've been in business. And we try to keep it updated all the time.

Q So you provide promotional material to them; correct? You give them price discounts when those types of stores that want to go on sale want to go on sale.

A Right.

Q Do you do any like joint advertising with them?

A Well, we do provide money for best-food-day ads so that our brand name is in the ad. Yes, we do that.

Q And you pay a portion of the cost of that ad; correct?

A That's right.

Q Do you also, as part of your promotions, rotate the types of mushrooms sold?

A Sure. Sure, we—if a customer—if a chain store has a promotion program and not an everyday old price program, you'll see their ad on Wednesdays or Thursdays in the newspaper. It's called best-food-day. Some markets, it's on Wednesday and [3-618] some markets, it's on Thursdays.

We pay a fee to have mushrooms in that ad. Now, if we have a hundred percent of that customer's business, we have our brand name in that ad. If we share that business, we don't.

Now, you don't have a lot of customers sharing accounts. Most of our retailers—let me go back. All of our retailers, we either have a hundred percent of the business or we share that business with one other grower.

Now, that other grower may have a minority position or a majority position or we may share equally. But there's not an undetermined number of mushroom growers servicing retail accounts in Phoenix and Los Angeles and Denver and Salt Lake City and Boise and Portland and Seattle. Now I can't speak for the rest of the country and I don't pretend to because we're not national, we're regional.

Q What are some of the other product differentiations that you make to help promotions?

A Well, we promote different items. We don't promote eight-ounce button mushrooms every rotation. We might do sliced and we might do stuffers.

Q What are stuffers?

[3-619]

A Stuffers are jumbo mushrooms; you turn the cap over and you put something in there that's probably not really good for you, like cheese or some fattening item, because you don't have any fat in the mushroom so most people will take something that is fat and add it to it. But it's a holiday item so it sells very well seasonally.

Now, two things I heard yesterday I think I need to make sure that I set the record straight from my perspective.

It is seasonal; there is a seasonality. And the reason it's seasonal is, sales are driven by shelf space and, during the times of the year when you've got local produce, local cherries, local apples, local green beans, there's a lot of items competing for a definite amount of linear feet.

Now mushrooms get squeezed in, get squeezed out because, you know, we're there every day, we're there every month. So the retailer depends on us in our market to be almost accordion-like, we can expand or we can contract. We want the most shelf space that we can get because it's proven that the more linear feet you have, the more attention you're going to get, the more likely it is that a shopper is going to stop in front of your mushroom section and [3-620] look and buy.

Because it is an impulse item. It looks good, it's fresh, attractive price, perceived good value built in the product.

The other thing is, you sell more when it's on promotion and it does not have a negative impact on the following week. And the reason that is, it's just common sense, you have a definite shelf life, if you buy two packages this week because they are on a reduced price, if you want mushrooms next week, you better not go back to the refrigerator and try to use those mushrooms that you purchased last week. They won't look good, you won't think they taste good, you might even think they don't smell good. So the next week, if you want mushrooms, you've got to buy them again.

So, if you had a promotion program in place and we do on a regular basis, rotating ads, you're going to sell more in a given time and it's not going to have a one-for-one impact on future sales.

Q So you disagree with same of the testimony yesterday?

A Those two items are right in my mind, seasonality—it is seasonal. Holiday time, we couldn't sell enough, we couldn't have enough mushrooms on hand to service our customers during [3-621] Thanksgiving week and Christmas week. We always run out.

Q In the fresh mushroom industry, approximately what size is Pictsweet?

A I suspect that, total pounds grown, we're third. I suspect we're third.

Q Is that overall mushroom industry?

A I would guess. Campbell is—well Campbell's representative said they were the largest. Monterey says they're the largest. I won't argue, they're the largest two and we're happy to be third.

Q But there are certain periods of the year that you can't produce enough?

A No. No, no, no, no. The holiday time is a time of special meals and mushrooms provide a special element for that meal, they enhance the meal. It's also a time when people who might be marginally attracted to mushrooms but think they are out of their price range, they'll splurge at holiday time. You know, it's Christmas, it's Thanksgiving, they'll do it because of that.

Q And have you found that, when you have done these promotional pieces, whether it's a price discount or going on ad, that consumption of mushrooms increases?

[3-622]

A Definitely, without a doubt.

Q And do you believe that it does not decrease consumption, then, the following week?

A Those mushrooms which are purchased on ad, the additional quantities that are purchased because of the price being offered to the consumer, will not replace nor substitute the following week's purchases. If they are going to purchase the following week, they cannot displace that purchase with inventory on hand in their refrigerator.

Q Now is that just your opinion or have you spoken with the retailers?

A That's our retailers' belief.

I believe that, our retailers tell us that, our statistics show that. Our relation with our retailers is excellent; if it wasn't, we wouldn't be their primary source of mushrooms.

Q Do you also provide recipes?

A Sure.

Q Okay, and that's at your cost?

A Sure.

Q Do you do in-store promotions?

A In-store promotions, you mean—

Q Well, in-store demonstrations?

A Right, we do.

[3-623]

Q And have you found in-store demonstrations—do you believe that that increases the number of consumers that buy mushrooms?

A And I guess I could possibly agree and disagree with Jack Reitnauer yesterday. There's two reasons to do these in-store demos, I think. One, your retailer encourages you to do it and, two, the people you reach there, it's the best opportunity to reach those that don't

use mushrooms on a regular basis or maybe don't even use them at all.

You can entice people to try something that they've never tried before if you're giving it to them free. That's just human nature. So we do that on a systematic basis.

Now it's not going to give you this quarter's results, it's going to give you a long-term benefit, it's going to cement your relationship with the retailer, and it's going to provide those shoppers who maybe wouldn't spend $2.00 for a pound, they might even take your sample, and when we do that we also give them a recipe that they can try, and maybe even a coupon for 25 cents off their first purchase.

Q So, when someone tries one of your mushrooms in the store, tries one of the mushrooms during the demonstration, you may give them a coupon [3-624] for like 25 cents off?

A Right.

Q Does Pictsweet keep track of the redemption rate?

A Right, we do. There's a clearing house for coupons. You know, coupons, every Sunday you can use, like when you've got a sheet of coupons. I read where the big national companies say that two or three percent redemption rate is good.

But, when you hand that coupon to a customer, a potential customer or a current customer, in the store or at a food show—you know, most of the big chains have annual food shows, most of the big cities, most of

the wholesalers, they have food shows and they have thousands of people come to these food shows and we always participate in those—and hand coupons out and hand recipes out, you hand free food out, these coupons come back to us 10, 15 percent.

Now, that's not a hundred percent, that's a long hundred percent, but it's five, six, seven times the annual redemption rate on Kellogg's Corn Flakes. That's what I read and that's only what I know.

Q Now all of these things that you have described as to what you do to promote and increase [3-625] the consumption of mushrooms, does that cost Pictsweet money?

A Sure.

Q Do you believe, as President of Pictsweet, that Pictsweet knows best how to survey the customer?

A Sure.

Q Do you believe that Pictsweet knows best how to increase the consumption of mushrooms with your retailer?

A Oh, most definitely.

MR. LEIGHTON: Your Honor, may I approach the witness, please?

JUDGE BERNSTEIN: Yes.

MR. LEIGHTON: I would like to show you what's been marked as PX No. 7.

(Whereupon, Petitioner's Exhibit No. PX-7 was marked for identification.)

JUDGE BERNSTEIN: I think I have copies of—I had copies of 7.

MR. LEIGHTON: No, this is a brand new one.

JUDGE BERNSTEIN: Okay. You had . . . .

* * * * *

[3-632]

where they squeeze the section down and it's a rifle approach; you can't shotgun it, you've got to rifle it, not only with the chains but with the individual stores. It has to be a rifle approach, rifle merchandizing not shotgun merchandizing.

Retailers are very knowledgeable about their business.

Q Have the Pictsweet's marketing efforts changed since the formation of the Mushroom Council?

A No. No, we couldn't afford a change and I don't think anyone's changed their marketing efforts. We have to keep focused in moving product.

Q Is that what your retailers expect?

A I don't think they'd allow us to do anything else.

Q Have you spent any less money on your marketing efforts since the Mushroom Council was formed?

A Only the assessment. Our own direct efforts have not changed.

Q You would do that anyway?

A Certainly.

Q So the only cost increase is the assessment

A That's right.

[3-633]

Q What is Pictsweet's position with respect to the attempt to put together the Mushroom Council?

A Well, we were a forthright, obvious from the very get-go opponent of it. We didn't think it would work in this industry; and we still don't. But we certainly have—I've certainly used my talents, as meager as they may be at times, to fully support the Council; and I think everyone would agree with that. I've served—

Q You still don't believe it will work?

A I don't believe it will work in an industry such as fresh mushrooms where it's a regional business. Each market is different, you have to focus on that market and you can't use the same techniques in every market. It's a regional business.

Q Before we get into that again, let's get back to your opposition. Did you talk to USDA about how you opposed it?

A Yes, we did. We were open, and we still are; we're forthright; and we lost in referendum.

Q Did you testify in Congress?

A Yes.

Q Who was the proponent of the—what Congressman was the proponent of this Council?

A I don't think I know that.

[3-634]

Q Was he from Pennsylvania?

A I think so but I can't call his name. I know he was from Pennsylvania; I can't call his name.

Q Is Pennsylvania the biggest mushroom-producing state?

A The USDA statistics, 47 percent of all the pounds grown in the U.S. are grown in Pennsylvania and predominantly in eastern Pennsylvania.

Q Are they fighting over a lot more markets than what you're fighting for out here on the west coast?

A Obviously, obviously. They've got 47 percent of 750 million pounds, they have to struggle. I'm sure they have to struggle. I can't identify with them because I'm not there, never have been there, never participated in that market.

Q And California is what percent?

A Seventeen percent of the national. So you've got 47 and 17, that's two-thirds, I guess.

But that 17 percent is skewed toward the Bay Area. There's one or two farms in San Diego County, we're in Ventura County, I can't think of another farm until you get to the San Jose area.

Q What about east from L.A.? You service Phoenix; do you know if anybody else services Phoenix?

[3-635]

A Monterey services Phoenix and ourselves, that's the only two.

Q Does anybody else service Denver?

A There's a farm in southern Colorado who has serviced the Denver market; it's their primary market. We service it from Fillmore, Utah, and Monterey services it from the Watsonville and Morgan Hill, California farms.

Q Do you service San Francisco at all?

A No, we don't.

Q That's how regional it is. You have a farm a few hundred miles away but you do not service San Francisco.

You testified in opposition to the program in Congress?

A Uh-huh—yes, I did.

Q Was it just your position or was there a body of people that—United or Pictsweet—that agreed with you?

A Well, it was our company's position, it's my personal position and it was our company's position. And although we were obviously the open opponent, 35 percent of the growers voted in opposition to the program.

Q Now you lost in the referendum; correct?

[3-636]

A Right, we did.

Q And did United go so far as to attempt to get a list of the producers to lobby the producers?

A Yes, we did.

Q Did USDA give you a list of the producers?

A No, they did not.

MR. COOPER: We're getting into—

JUDGE BERNSTEIN: We're getting into an area that we agreed would not be relevant to this proceeding.

MR. LEIGHTON: We're just talking about the support in the industry, Your Honor.

JUDGE BERNSTEIN: I don't want any further into what happened in the course of the referendum.

MR. COOPER: I'd like to have that last question and response struck. It's irrelevant to this proceeding and I don't think it's completely accurate. And I don't see a need to explore it on our examination to straighten out something that isn't relevant.

JUDGE BERNSTEIN: We're not going to go any further into this—

MR. LEIGHTON: That's right -

[3-637]

JUDGE BERNSTEIN:—in terms of—

MR. LEIGHTON: That is correct.

JUDGE BERNSTEIN: Okay.

MR. COOPER: So the court, therefore, is not striking the answer.

JUDGE BERNSTEIN: I don't recall the question.

MR. COOPER: He said the USDA would not supply a list, I believe, and I think our position is somewhat contrary.

JUDGE BERNSTEIN: I don't find that to be relevant to the issues of this case. Whether or not they supplied a list is, in my mind, irrelevant.

MR. LEIGHTON: Your Honor, I think it's marginally relevant for the following reason: Is that USDA, in response to these petitions and in briefs and stuff like that, they talk about the fact that how, you know, the program had the overwhelming support of

growers and things like that. And they will announce that they had 65 percent in this referendum.

The 9th Circuit Court of Appeals, in another Cal Almond decision when Cal Almond attempted to get the list of growers of almonds and USDA refused to provide it, and the program—the suit went up to the 9th Circuit Court of Appeals and the 9th Circuit [3-638] Court of Appeals said the First Amendment required that the list be provided to allow people, proponents and opponents in the industry, to lobby against the legislation just like you would have if there was referendum.

So I want the record to be clear, when USDA purports to talk about how many people supported the program, that USDA refused to provide the list of producers so people could lobby the producers and tell them what's going on.

MR. COOPER: Well, quite the contrary, we did offer the list eventually and they refused to take it because of pending litigation I assume they had against the Department.

JUDGE BERNSTEIN: It was my understanding that this would not be an issue and you've taken issues related to the vote from your petition. Therefore, I would consider this to be undue surprise to introduce this issue into evidence.

MR. LEIGHTON: Okay. I'm just stating my position for the record.

JUDGE BERNSTEIN: Okay.

MR. LEIGHTON: So, we'll move on.

BY MR. LEIGHTON:

Q Now the referendum passed and what was [3-639] Pictsweet's position with respect to the Mushroom Council at that point?

A Well, by securing a position on the Council so that we could be involved in the process, so that we could protect our investment, so that we could make sure that the Council was accountable for their action.

Q So did you run for the Council, or however that happens?

A The process, basically, is I was nominated for a position. Two producers were nominated for each position in open regional meetings and then, from the two that were nominated, the Secretary of Agriculture selected one of the two. And I was selected to represent the Western Region.

Q And who was the other nominee, or what entity?

A Monterey Mushrooms.

Q And, at the time the legislation went through and the time the Council was formed, was there any crisis in the fresh mushroom industry.

A We didn't think there was a crisis. We were excited to be in the business, still are.

Q Were a bunch of growers going out of business?

[3-640]

A I don't know. If those growers couldn't keep up with the advances in yields and reduction in cost, I'm

sure they were getting left in the dust. But a lot of growers are in business and there's a lot of people who are happy to be in this business.

Q Was Pictsweet making money in 1992 and 1993?

A 1991 was the most profitable year in a series of increasingly profitable years since we started. And since then, the years have been increasingly profitable; and 1994 was just as profitable.

Q Now what did you do as a result of your appointment to the Board by the Secretary of Agriculture?

A Well, I adhered to the duties of Council members. I was elected Treasurer of the Council at the first meeting in Washington, I was chosen of one of three to serve as a selection recruitment committee for securing the President/CEO's position. I secured a line of credit for the Council for their operating expenses up and until the time that the assessments starting flowing.

Q Was that something Pictsweet did on its own?

[3-641]

A Yes.

Q Pictsweet secured the line of credit for the Mushroom Council?

A From my bank, a line.

We prepared the financial statements on a monthly basis for the first month until the Sacramento office was opened and a local accounting firm was hired. A period of months, I can't tell you how many months.

Q Did you do that for free?

A Sure, yeah.

I have attended all but two meetings and I've shown up at the appointed hour and I've stayed until the very end. I've been as supportive as I possibly could have been.

I think I called the President/CEO, Mr. Whitfield, on a periodic basis; I've offered to help him any way I could. I offered my personal support to steer ideas that he thought were beneficial through the political process. I think I've done as much as I possibly could and I think I've done more than some others have done.

You know, some of the Council members don't seem to be as interested as I am and they were for it. They don't come to all the meetings. They [3-642] have their own reasons, I'm sure.

Q Now these meetings are held all over the country; aren't they?

A Yes.

Q So it's not a simple thing to go to a meeting.

A No, it's not for me. We have the meetings in all geographic areas but we've had a preponderance of the meetings in Sacramento, which I support because that's our headquarters. So Sacramento is not a direct flight for me. So the travel arrangements have to be planned in advance; and they ought to be in advance.

Q Now you have been with the Council and on the Council and a competitor in the industry since the Council was formed. Do you think the Mushroom Council can do a better job with your assessment dollars than you can?

A No. No.

Q And is part of that opinion based upon what you've seen them do?

A Well, you heard testimony this week that the results of the council activities haven't increased consumption or increased—

MR. COOPER: Objection, Your Honor—I'm [3-643] sorry.

THE WITNESS: I agree with that; there's is no measurable improvement or no—there's no measurement to what's been done, no impact.

BY MR. LEIGHTON:

Q And based upon what has been done, do you think there's any effective way to even measure that?

A That's very difficult. I know all the strategic plans, and we have a measurement of the program—an evaluation of the program, and it's one thing to say that you have a plan and you execute the plan; it's another thing to say that the plan resulted in increased consumption.

Now the—and I was very happy with this, I was very pleased—at the very first meeting we had, there was a unanimous agreement that we would measure the

Council's performance on per capita consumption. And, if it did not go up, the Council had failed. And the five-year plan is to go from 1.9 pounds per capita to 2.1 pounds per capita.

Well, that sounded real good. I have to admit, I thought that was great, if we could do that that would be great. I just got—I overlooked one factor there and that is that we were already at two pounds based on USDA's numbers. I should have caught [3-644] that; we all should have caught that.

We're an instrumentality of the USDA and the USDA say that it was two pounds. Well, one-tenth of a pound may not seem like much but you're only talking about two-tenths of a pound. So we've already achieved half our goal before we even went into business in 1993 because 1992 consumption was two pounds. I just blew it; we all blew it. We should have seen that.

But we are unanimous that it will only be successful if we increase consumption, per capita consumption.

Q Per capita consumption. Your firm is increasing sales; correct?

A That's our job.

Q And you have done that?

A And we've done that.

JUDGE BERNSTEIN: Let's take a recess, we will recess for ten minutes.

(Whereupon, a brief recess was taken.)

JUDGE BERNSTEIN: The hearing is back in session.

BY MR. LEIGHTON:

Q I understand the first big program that the Mushroom Council began was the Valentine's program [3-645] purporting mushrooms to be aphrodisiacs; is that correct?

A That's right.

Q Did you vote for that program?

A No.

Q Why didn't you vote for that program?

A Well, there's several reasons. I think Mr. Whitfield yesterday said that it was because of it being an interim program; and he's right. It was an interim program before we had a long-term strategy.

And he had voiced his position that he didn't think that an interim program that didn't have a long-term strategy would be successful or be meaningful.

And I thought the term "purporting it to be an aphrodisiac" was in poor taste. And it was.

Q Did Pictsweet want to be associated with that message?

A No. No.

I asked the Council to reflect in the minutes that I was opposed to it and why.

MR. LEIGHTON: May I approach the witness, Your Honor?

JUDGE BERNSTEIN: You may.

MR. COOPER: This is a letter from—

[3-646]

(Whereupon, Petitioner's Exhibit No. PX-6 was marked for identification.)

BY MR. LEIGHTON:

Q Mr. Haltom, is this a letter you wrote to Mr. Whitfield with respect to that Valentine's Day 1994 program?

A It is.

Q Another program that they had was the "Blueprint for Profits"?

A Right.

Q And did you vote in favor of that program?

A I did.

Q And did you have any concerns that it wouldn't work?

A Well, it was not something that was—it was not really a new program, it was a restatement of some very well-known, well thought of practices for merchandising fresh mushrooms. It was a schematic diagram. Mostly retailers, given their dictates, given

what, they need to do, they will try; they are interested in doing things like this.

This has been an evolving program by [3-647] mushroom producers and I think, this was an attempt by the Council to bring it all together.

Q Did you find many of your retailers already did things similar to that?

A Yes, I did. And the ones that didn't, I can't tell you today that they've done anything different because of the blueprint that we gave them. I think they should but they've got a lot of other pressures.

One of the pressures they have is all the proliferation of pre-packed salads and they take a lot of shelf space. So they've got their own concerns, they've got their own requirements. And what we told them, what the Council said for them to do would be good for the mushroom industry, but it's a store-by-store, chain-by-chain business decision.

Q Now has Pictsweet worked with retailers prior to the formation of the Commission as how to package the product, how to display it and those types of things?

A I'm sure all growers have; it's just part of the business, everyday business.

Q Now this "Blueprint for Success" and how to operate that, is that the only way to be able to display mushrooms and market mushrooms?

[3-648]

A No, no. There's many ways to do it. This is one way and it's a good way.

Q Now, as a result of that project, did you find sales increased?

A We couldn't measure the benefit of it.

Q Did any of your retailers think or tell you that they thought sales had increased?

A They have not told me.

Q Now do you recall any other programs that you know were approved by the Council?

A We've done a lot of research—the Council's done some research trying to establish the baseline so that the program can be measured in future years at to its success.

Q What about some of the other promotional programs that—

A The public relations activities?

Q Yes, that Robyn Wilk testified to yesterday.

A I think, you know, Robyn expressed herself extremely well. She has done a tremendous job of getting the message out. You know, it's confusing to me and it's confusing to every one, if you measure the exposure, what does that translate into sales volume? She's done a great job. I mean, she speaks [3-649] well, she's knowledgeable, and she'd done a good job. The PR campaign is moving forward.

I don't know if it will work. It makes you feel good because you look in the paper and you see the product that you sell and it does make you feel good. But I don't know if it's going to work.

Q Have you seen any results of it yet?

A We haven't been able to measure the impact on our business.

Q Do you believe that $1.5 million budget can influence the national market?

A It doesn't seem like it would be enough.

Experts before me—and I'm certainly not an expert—they say it's not enough. We don't conduct a national campaign so I wouldn't know. It seems to be meager.

Q And, for example, like you have a big portion of the L.A. region, you have a big portion of the Portland and Seattle, Denver, Utah, Phoenix regions.

A Right.

Q Is a regional program in New York going to do anything for you?

A Nothing.

Q Is a regional program in L.A. going to do [3-650] anything for the Pennsylvania growers?

A Nothing.

Q And is that the way throughout the market in the United States?

A Obviously so. It may help Campbell. They said they like to think of themselves as national because they're where the people are. It may help Monterey because they have farms in Tennessee and Texas. And, you know, they are semi-national. But it won't help the other 157 or how many growers there are. I don't guess anybody knows exactly. I don't know exactly.

Q Have you been involved in the Council meetings when it's come time to vote on the budgets and determine the assessments?

A Oh, sure, every one.

Q Has the Mushroom Council ever raised the assessment rate?

A No.

Q What has been the discussion with respect to why not?

A Well the conversation has been, "Let's wait till we see some results." It's a quarter-cent, it started at a quarter-cent; it could have gone from a quarter-cent to a third of a cent to a half a cent [3-651] to one cent. So it's only half of what it could be right now.

And obviously, if the Council members thought that there was enough industry support, they would have optimized the level of assessment. Next year you go to one cent. We're in the process now of developing a budget for next year.

I can't see any scenario where it would go higher than a half-cent, and it could be at one cent. And I can't give you each individual Council member's background

for why they think there's not enough support. Obviously, I want us to make sure that every dollar that we collect is spent in a way that will—because we are held accountable.

So I want to see the program before we raise the assessment.

Q And, at this point in time, you have to pay it; correct?

A We do.

Q So you want to make sure that it's spent the best way you think it should be spent?

A Certainly.

Q Do you believe that growth in the fresh mushroom industry is naturally occurring?

A Certainly.

[3-652]

Q The per capita consumption, why is that harder to achieve than increased sales?

Now, increased sales increases your profits; correct?

A Uh-huh.

Q Per capita consumption may or may not increase your profits but it could. But why is it harder to increase per capita consumption based on the demographics in the United States?

A The population segments that are growing the most dramatically, Hispanics, don't include mushrooms in their daily diet. So, as the population of the non-Hispanic slows, the per capita consumption will be hard to increase.

I think that's why—looking backward, I think that's why the Council members took such a small gain in per capita consumption from 1.9 to 2.1 for the full five years of the program.

Q Can the amount of the Mushroom Council assessment reduce the amount Pictsweet can spend in its mushroom efforts?

A It can't reduce what we spend on our market programs.

Q You are going to spend that anyway; correct?

[3-653]

A Certainly.

Q Could it have an impact on your expansion?

A Well, I guess at some point the assessment would be such a burden that we'd have to curtail some of our activities such as capital improvements, but that would have to be judged on a year-by-year basis. I couldn't say today that would happen but, obviously, if the burden of the assessment grew, we'd have to look at our total operations.

Q Now based upon the assessment rate that has been prevalent in the last—since they formed the

Commission, does Pictsweet just consider that as a tax that comes off the bottom line?

A Certainly.

Q You make less money because of that tax?

A Right.

Q Although it's statutory, does the Mushroom Council allow Pictsweet to receive a credit for any amounts of money that you spent promoting your mushrooms?

A No.

Q And do you believe that your monetary efforts in promoting your mushrooms has increased consumption?

[3-654]

A Well, sure, we wouldn't do it if it didn't.

Q Since there is this program that's mandatory if you produce more than a half a million, do you believe that the growers that produce less than a half-million pounds should also pay?

A Well, they get a free ride. They benefit by it.

Q Do you believe that the processors of mushrooms should pay an assessment?

A I always have.

Q Why is that?

A They're getting the benefit of it.

Q Now can you describe why you believe that the processors get a benefit out of the fresh mushroom assessment?

A Well, if the program is successful, if it is successful, total mushrooms—or the way the consuming public perceives mushrooms will have to improve. And if it improves fresh, it's going to improve all forms it would seem to me.

Q Now have you seen the processed mushroom people benefit from any price increase in the fresh sales?

A I don't think I understand that question; [3-655] ask it again.

Q Have you seen any of the processed mushroom people receive a benefit from the price of fresh sales?

A No.

Q Have you seen that—it was mentioned yesterday, let me bring up a situation.

Do you recall when a major mushroom producer called Moonlight went out of business?

A I sure do.

Q Okay, what happened?

A I believe, in 1993, they had a labor dispute and that led to a decision to close that farm. I believe the last day or the last month of business was December of 1993. And they were producing at that time about 35 million pounds a year. In the preceding years, they had produced as many as 50 million pounds.

Q In one location.

A The largest single operation in the country.

Q Okay. What happened when they closed down?

A They closed down, the sales for those pounds were distributed among, I assume, other growers in the Pennsylvania area. Nationally, I think there [3-656] was a perceived shortage of mushrooms and probably a real shortage in some markets.

The fresh price, I understand, in the east—we don't sell there, but I understand that it had a marginal increase. The price of last resort, the price that Campbell's would post or Monterey would post or somebody that would post a price and buy at that price on the given week, any given week, that price doubled, that price went from the 30-something cent range to the 60-something cent range.

Obviously, when Campbell's needs mushrooms for mushroom soup, they're going to procure them.

Q So is it true that the higher—the more demand there is for the fresh, the higher the price of the processed mushrooms go up?

A Certainly.

Q So the sellers into the process market will receive a benefit from the shortage of supply of the processed mushrooms?

A There are three categories of growers; there's growers like—I suspect there's some growers in northern California that sell everything to retailers and

maybe some wholesalers. There are growers in Pennsylvania that sell nothing but [3-657] processor markets, they have contracts with Campbell's; with Giorgio, which is a large processor; and their entire crop goes the processing route.

Then there's those in between like most everyone else who sell fresh, some processed contracts, and then the processor of last resort.

So when the supply went down dramatically, the big gainers were those growers that just grew for the processing market.

Q So the flip side of the same coin is, if the demand increases for fresh, the demand will increase for the processed?

A Right.

Q Do you believe that the people that sell the processed should pay an assessment?

A Yes, I do.

Q Are any of the other fruits and vegetables that Pictsweet sells required to pay an assessment for promotion programs?

A No.

Q Mushrooms is the only one?

A Only one.

Q Now you were present when Dr. Ward testified regarding some of the criteria that he looks at to

determine a rule of thumb as to whether or not a [3-658] generic program would work?

A I was present.

Q One of the things he stated that a generic program would work if it's a homogenous product; did you hear him testify to that?

A He did.

Q Do you believe that mushrooms, as sold in the marketplace today, are homogenous?

A No, they're not homogenous, there's different varieties, there's mushrooms that are called exotics that sell for $3-4.00 a pound, there is levels of service that are attached to all mushrooms that make their value different and make them non-homogenous. Different forms, different levels of service, different varieties—

Q Packaged differently?

A Different package types and styles.

Q One of the things you heard from one of the studies that was done by one of the groups is that some consumers didn't like the fact that they have to slice mushrooms; correct?

A Right.

Q You do provide that service; correct?

A We have sliced mushrooms in our line. It amounts to about ten percent of our total sales now.

[3-659]

Q Okay. So you have satisfied that demand for those consumers without the Mushroom Council?

A Right.

Q Now one of the other points that he brought up is that, for the program to work, it should be like the same grades and standards because, if you have a super good quality and a real poor quality based upon different grades, the generic program is less likely to work; did you hear that testimony?

A Right.

Q Now could you explain mushrooms as it fits into that criteria?

A Mushroom quality is subjective. You have a No. 1 product and what could be a No. 1 for grower-A might not be what another grower would think would be a No. 1 product.

You have product—you have mushrooms that are picked today that are No. 1, they don't sell today, if they're held in the cooler for a day or two, they might be downgraded. They might not look as good, they might darken, they may change, very different ideas about the quality based upon the eyes of evaluator.

Q Have you found that that downgrading in the quality, turning brown and those types of things, [3-660] does affect the consumption or the sales of that product?

A Certainly. Certainly; it's an impulse item. If it doesn't look good in the cabinet, people won't buy it. They won't; they won't buy it. It's not an essential part of their life and their diet.

Q Now he also discussed the fact that a generic program won't really work if you have a person in the industry that has the monopoly or the—oligopolistic; did you hear his testimony regarding that?

A I did.

Q Now, in the mushroom industry that is not true with respect to the entire nation; is that correct?

A That's right.

Q Is it regionally?

A In every market that we participate in there is a very limited number of growers. If I would look at each market individually, and I guess I should just to explain who our competitors are or how many competitors there are, because it varies by market.

In L.A., San Diego, southern California, there's three of us that have 95 percent of the business and the other five percent, one, sometimes [3-663] assume that they have a variety of sole-supply customers and majority positions and minority positions, just like we do with the few growers that we have in our markets.

Q And what about New Orleans?

A I would think—and I don't know this, I've been in the New Orleans market, Monterey has a farm in east

Texas and, given the geographic area, I'm sure they have a preponderance of that market.

Q Now you mentioned barriers to entry and one of the things Dr. Ward stated, that the barriers to entry are high, it is more difficult to have—a generic program is more likely because, as he explained it, that, if the price is increased, it's harder to take advantage of that price increase because of—

A I understood him to say that.

Q —cost to get in there. Did you hear him testify to that?

A Yes.

Q Explain that as far as mushrooms go.

A Well, I'm going to give you an example.

Moonlight went out of business in December of 1993. There was an immediate in reduction in supply of 35 million pounds. Now those growers who [3-664] participate in that northeastern market who are on the Council—I don't know many others except the Council Members—they told me that there was growing space that was not in production that made up 20 million pounds three months after Moonlight shut down.

We personally have the ability to increase our square footage on a short-term basis, three or four months.

Q And is that where most of the capital investment has already been put out, you just have some excess space available?

A Well, in Pennsylvania, as I understand it, they had some rooms out of service, they would have to improve the quality of the air handling in those rooms, improve the quality of the bed structures, and that's just the carpentry work and buying some air conditioning.

Q Now if, for example in the mushroom market, you have some excess capacity that you're not using right now; correct?

A That's right.

Q Okay. If you saw that mushrooms that you only got $1.29 a pound for all of a sudden went to $1.59 and you saw that, would you grow more?

A We would grow more. We are growing more [3-665] now. I mean we are continuing to bring our level of production up through improved growing techniques, through improved air handling, and we have some space that we could add. As we go, we will be adding it. If we saw a sharp spike in our opportunities to sell mushrooms, we'd have the space up in just a few months.

Q Okay. And the space that you already have but perhaps you're not actually growing mushrooms, how long will it take you to get that extra production if today you decided, let's grow some more?

A I'm going to make the assumption that the hardware is on the shelf, and it more than likely is, four months. If it's manufactured air handling equipment, six, seven months.

Q As opposed to like in tree fruit, it takes seven years to get a tree up to production.

A That's what I've heard in this room, yes.

Q Okay.

A Right.

Q And have you seen short-term responses to price increases?

A What do you mean by short-term responses? From whom?

Q Well, on these price increases, getting [3-666] back to what we're doing, that, if there is a shortage, we know, based upon what you stated, you could have —you could fill that void within a few months with the space that's currently available.

A Uh-huh, right.

Q So I guess it's probably my same question that there is a short-term response.

A Well, the Moonlight is a real, live example that everyone knows about in this industry. They went out of business; within a matter of weeks, production increased to make up half of that. And I'm sure that, if they had stayed out of business, there would have been other space that would have gone in that would have made the entire national supply the same as it was before.

Q If a vote was held today as to whether or not the program should be terminated, how would you vote?

A We'd vote to terminate the program.

Q You think you can do a better job with that money than the Council can?

A We've said it all along, I still believe that.

MR. LEIGHTON: Nothing further, Your Honor.

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

MPRCIA Docket No. 96-0001

IN RE: UNITED FOODS, INC.,
A DELAWARE CORPORATION, D/B/A
PICTSWEET MUSHROOM FARMS, PETITIONER

[Filed: Aug. 1, 1996]

SUMMARY OF TELEPHONE CONFERENCE

In an August 1, 1996, telephone conference with Brian Leighton and Gregory Cooper, counsel for the parties, I told counsel that it appears that this matter is similar factually to the case of Donald B. Mills, Inc., MPRCIA Docket No. 95-0001, which I decided on April 26, 1996, and reconsidered by written decision on June 12, 1996. I proposed that, based upon stipulated facts, I render a decision which would be similar to the Mills decision and then if it is decided upon appeal, as respondent contends, that my decisions are erroneous, the decision in this case along with the Mills decision could be reversed.

Mr. Cooper recommended that I stay this matter pending guidance of appellate courts. Mr. Cooper stated that the facts in this case may be somewhat different and that in Mills it did not contest testimony by United Foods because it did not feel like as much was at stake with respect to United Foods. Mr. Leighton stated that essentially my decision in Mills

was that the government program was not effective and not narrowly tailored and that decision would apply regardless of how good or bad Pictsweet's program is.

Since there is a disagreement between counsel as to what facts, if any, need be decided in this matter, I directed counsel to brief the issues.

It was agreed that Petitioner will file a brief on or before September 3, 1996, and Respondent will file a brief on or before October 2, 1996. Petitioner's brief will state what facts, if any, I need find in order to render a decision in this case and why I can make such findings. Respondent will indicate what questions of fact must be decided before a decision can be made. Based upon these briefs, I will decide whether or not this case can be decided without hearing.

/s/ EDWIN S. BERNSTEIN
EDWIN S. BERNSTEIN
Administrative Law Judge

August 1, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

Case No. 96-1252

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED FOODS, INC., DEFENDANT

Case No. 98-1082

UNITED FOODS, INC., PLAINTIFF

v.

UNITED STATE OF AMERICA, THE
UNITED STATES DEPARTMENT OF AGRICULTURE,
DEFENDANT

[Filed: July 9, 1998]

AFFIDAVIT OF DONALD DRESSER

Donald Dresser, being duly sworn, states under oath as follows:

1. I am the Executive Vice President of United Foods, Inc. ("United Foods"). I have been with United Foods since 1985. I received my undergraduate degree in economics from the California Institute of Technology. I received my law degree from Harvard Univer-

sity. Before I joined United Foods, I practiced law in the fields of antitrust and economic regulation.

2. I was the person primarily responsible for United Foods' acquisition of its mushroom business in 1987, and I am familiar with the operation of United Foods' mushroom business. Because of my background and my job responsibilities at United Foods, I am also familiar with the economics of the mushroom industry.

3. I am knowledgeable of the COMPLAINT FOR REVIEW OF AGENCY ACTION AND FOR DECLARATORY RELIEF filed by United Foods in this action "United Foods' Complaint"), and all facts stated in that Complaint are true and correct to the best of my knowledge, information and belief. The statements contained in United Foods' Complaint are incorporated herein by reference.

4. The mushroom industry is a competitive, unregulated industry. Other than regulations affecting food products generally, in the mushroom industry there are no regulations governing such matters as the quality or grades of mushroom products, packaging, advertising, pricing, production levels, or the orderly disposition of surplus product. There is no regulation of the mushroom industry that specifically controls the supply of or demand for mushroom products, competition within the industry, or the manner in which mushroom products are sold to the consuming public.

5. In 1990 Congress enacted the Mushroom Law, 7 U.S.C. §§ 6101-6112. Pursuant to the Mushroom Law, the United States Department of Agriculture (the U.S.D.A.) promulgated the Mushroom Promotion, Research, and Consumer Information Order at 7 C.F.R.

§§ 1209.200-.280 (the "Mushroom Order"). Under the Mushroom Order, there was formed a Mushroom Council, which is a committee of mushroom producers (some of whom are competitors of United Foods). The Mushroom Council exists to collect assessments from non-exempt mushroom producers, such as United Foods, and to use the monies so collected to develop industry-wide (i.e. nationwide) promotion, research and consumer information programs for mushrooms, ostensibly to stimulate the demand for fresh mushrooms.

6. The Mushroom Law is "free-standing" legislation, in the sense that it provides only for the compelled generic promotion and advertising of fresh mushrooms to the consuming public. The Mushroom Law does not contain any provisions for the regulation of any aspect of the mushroom industry, and it is not ancillary to any regulatory scheme designed to establish or maintain orderly marketing conditions for the industry.

7. In this action United Foods is challenging on First and Fifth Amendment grounds the constitutionality of the Mushroom Law, the Mushroom Order, and the actions of the Mushroom Council for essentially three reasons:

> First, United Foods disagrees with and objects to the message conveyed by the generic advertising and promotional programs implemented by the Mushroom Council. Among other things, these generic advertising and promotional programs portray mushrooms as a homogenous product, which they are not, and undercuts United Foods' advertising and promotional programs for its own mushrooms which attempt to describe mushrooms and the

services provided by mushroom producers as differentiated products.

Second, United Foods objects to the "free-rider" aspects of the Mushroom Order. Among other things, mushroom producers who produce less than 500,000 pounds of fresh mushrooms per year are exempt from assessments. Additionally, mushroom producers who sell their product into the processed mushroom market (as distinguished from the fresh mushroom market) are exempt from assessments on those sales. To the extent any benefit can be realized from the Mushroom Council's programs, those benefits will be enjoyed by these "free-riders" who are exempt from assessments. For reasons explained below, the processed mushroom producers potentially stand to realize greater benefits from the Mushroom Council's programs than fresh mushroom producers.

Third, United Foods objects to the Mushroom Council's programs because they are ineffective and serve no valid governmental interest.

To understand United Foods' objections to the Mushroom Order and the Mushroom Council's programs, it is important to understand the economic structure of the mushroom industry and United Foods' position in the industry.

8. Mushrooms are different from other agricultural products in several respects, including the following:

- Mushrooms are grown indoors in a controlled environment. Compared to other agricultural products, therefore, mushroom production is

not as influenced by weather conditions and other events beyond the producer's control.

- Because mushrooms are grown in a controlled environment, mushroom production is not seasonal except to the extent that consumer demand is seasonal. Mushrooms are grown throughout the year.

- In economic terms, the "supply curve" of mushrooms is more "elastic" than many other agricultural products. This means that the supply of mushrooms in the market will rise or fall relatively quickly in response to a rise or fall in prices. This is due primarily to the fact that mushrooms have a relatively short growing cycle (approximately three months), and most producers have surplus capacity which can be quickly employed to increase production in response to market conditions.

- Fresh mushroom sales are strongly influenced by the demographics of the marketplace. Because mushrooms are not a necessary part of the diet and are considered to be a kind of luxury food item, certain populations are significantly more inclined to purchase mushrooms than other populations; and for certain populations, sales or marketing efforts inevitably will be ineffective.

9. There are generally three types of markets for mushrooms: fresh mushroom markets; processed mushroom markets; and the "market of last resort." Fresh mushrooms are sold to retail grocery stores and will command the highest prices. Mushrooms for the pro-

cessed markets are initially sold to mushroom processors who will then process the mushrooms into such packaged products as canned mushrooms, freeze-dried mushrooms, mushroom soup, and the like. The "market of last resort" consists of large mushroom processors who are constantly in the market for surplus mushrooms at quoted prices that are typically well below the prices prevailing in the other markets. At any one time, fresh mushroom prices might be in the range of $1.20 per pound, prices in the processed mushroom market might be in the range of $0.80 per pound, and prices in the market of last resort might be in the range of $0.30 to $0.60 per pound or below. The prices in the market of last resort are below the cost of production.

10. Certain mushroom producers sell primarily to the fresh mushroom markets; others sell primarily to the processed mushroom market; and others sell to both markets. A producer who sells to the processed food market and/or the market of last resort will divert sales to the fresh mushroom market when market conditions change through either a decrease in the supply of or an increase in the demand for fresh mushrooms. United Foods sells its mushrooms to both the fresh mushroom and processed mushroom markets. Our sales into the processed mushroom market are to a relatively small number of regular customers. Like other mushroom producers, United Foods sells as little as possible into the market of last resort.

11. Fresh mushroom markets are regional, not national. Fresh mushrooms cannot be efficiently transported for long distances for a number of reasons: they have a short shelf life; they bruise easily when transported over long distances; and they are light weight

(or low in density and therefore bulky), which means that transportation costs are high when measured on a cost per pound basis. Fresh mushroom producers, therefore, must produce their mushrooms in the geographic areas where their regional markets are located. Thus, for example, United Foods owns and operates three mushroom plants which determine the three regional markets into which United Foods sells its product: (i) the Southern California and Arizona market surrounding United Foods' mushroom plant in Ventura, California; (ii) the Pacific Northwest market surrounding its mushroom plant in Salem, Oregon; and (iii) the Central Rocky Mountain States market surrounding its mushroom plant in Fillmore, Utah. United Foods sells no mushrooms east of Denver.

12. Each of the regional fresh mushroom markets is self-contained. In those markets where United Foods sells its product, the retail industry has been rapidly consolidating into a smaller number of larger grocery chains; and, therefore, the total number of United Foods' customers within its mushroom markets has become smaller.

13. Additionally, within each regional market, there are a relatively small number of competing producers. There are two or three principal producers in each of the markets where United Foods sells its product.

14. Fresh mushrooms are highly differentiated; they are not a homogenous product. There are different varieties of fresh mushrooms. Mushrooms of any particular variety will come in different sizes. Mushrooms from different producers vary according to freshness, color, texture, and other qualities important to retailers and consumers. Growing mushrooms is as much art as

science, and the nature and quality of mushrooms can be identified to the producer. Producers further differentiate and identify their product through brand names and different kinds and styles of packaging. Producers also differentiate themselves in the marketplace by the kinds and levels of service they provide their customers in connection with such matters as the delivery and marketing of their fresh mushrooms.

15. Because of the regional nature of the industry, fresh mushroom producers do not independently engage in nationwide marketing activities. United Foods, like other fresh mushroom producers, engages in independent marketing activities, at its own expense, that are tailored to each of its regional markets and the stores within each market. United Foods' marketing activities include in-store demonstrations, in-cabinet storage containers, specials, and advertising programs that are part of an individual store's advertising programs.

16. United Foods sells its mushrooms under its tradename "Pictsweet." United Foods' marketing activities are designed to promote the distinguishing qualities of its mushroom products and therefore to differentiate its mushroom products and services in the marketplace.

17. The Mushroom Council engages in "generic" promotional and advertising programs for fresh mushrooms. These generic programs talk about mushrooms generally and do not attempt to describe the differences among the various mushroom products that are sold in the marketplace. The Mushroom Council programs, consequently, portray mushrooms generally as an undifferentiated product. The Mushroom Council's

activities are national in scope, and the Mushroom Council therefore spends money to promote mushrooms in markets outside of United Foods' markets. A generic advertising or promotional program that may have a positive effect in one regional market or among one group of consumers may have a negative effect in another market or among other group of consumers.

18. Attached hereto as Exhibit A is the Management Report for 1997 issued by the Mushroom Council. This Report briefly describes the generic promotional and advertising efforts of the Mushroom Council, and it includes the Mushroom Council's most recent financial statement.

19. In order for a nationwide generic promotional or advertising program for any kind of product to be effective, several conditions must be present: (i) the product must be relatively homogenous; (ii) there must be a relatively large number of producers in each market or submarket competing against each other, which would make it difficult for individual producers to differentiate or distinguish their product in the marketplace; and (iii) the supply curve for the product must be relatively inelastic. Generic promotional or advertising programs also are more likely to succeed where the market is national in scope and where there is relatively little variation in the demand for the product among different population groups within the market. Additionally, a generic promotional or advertising program is more likely to be effective in a regulated industry where the generic advertising can compensate for the restrictions on competition that arise from the regulated nature of the industry.

20. These conditions are not present in the mushroom industry. For that reason, generic promotional and advertising programs cannot be effective in the mushroom industry.

21. As a matter of fact, the generic promotional and advertising programs developed by the Mushroom Council have had no discernible effect on the different fresh mushroom markets where United Foods conducts its mushroom business; and to the best of our knowledge, these programs have had no discernible effect on any of the other fresh mushroom markets in the United States. There are several reasons for this. First, as noted above, the conditions for an effective generic advertising program are not present in the fresh mushroom industry. Second, the funds generated through assessments are inadequate to promote fresh mushrooms on a nationwide scale. As reflected in Exhibit A, in 1997 the Mushroom Council's total expenditures were $2,307,506, and of that amount only $1,094,658 was spent on "promotion programs." Any nationwide program, to be effective, would cost tens of millions of dollars or more. Third, the Mushroom Council programs cannot assist producers like United Foods in differentiating their products or in providing better quality of product and service to customers, which is necessary to any successful marketing program. And, finally, the Mushroom Council programs, by definition, cannot regulate the regional markets or fresh mushrooms.

22. To the extent that any of the Mushroom Council programs may be effective in increasing overall demand for fresh mushrooms, it is reasonably likely that the benefit from any such increase in demand would be

realized primarily by producers other than United Foods who sell into the processed mushroom market and the market of last resort. Based on what has happened historically in the industry, if there were a general increase in the demand for fresh mushrooms, it can be reasonably expected that the producers who sell into the processed mushroom market and the market of last resort would divert their sales to the fresh mushroom market. This would have the likely effect of suppressing price increases in the fresh mushroom markets and of decreasing the supply in the processed mushroom markets, which in turn would increase the prices for mushrooms sold into the processed mushroom markets. The producers who sell in the processed mushroom markets, therefore, would realize the benefit from a general increase in demand for fresh mushrooms even though they are not being assessed for the costs of the generic marketing programs for the fresh mushroom market.

23. Most importantly, the Mushroom Council's generic promotional and advertising programs send a message to United Foods' current and prospective customers which tends to undermine the advertising and promotional activities of United Foods. The Mushroom Council's programs portray fresh mushrooms as a homogenous product, which is not true. By portraying fresh mushrooms in this manner, the Mushroom Council delivers a message which is contrary to the message United Foods is attempting to deliver to its customers.

24. United Foods, in its marketing programs, attempts to portray its fresh mushrooms, and the services which it provides to its customers, as unique,

which they are. United Foods attempts to dissuade customers from viewing mushrooms as a generic, homogenous product. This is an essential part of United Foods' marketing and advertising activities. Certain of United Foods' competitors cannot compete with the quality of United Foods' mushroom products and services. It would be in the interests of those producers to promote mushrooms as a homogenous product in an effort to diminish the competitive advantage that United Foods otherwise enjoys in the marketplace. The content of the Mushroom Council's programs, therefore, potentially serves the interests of United Foods' competitors, contrary United Foods' interests. United Foods does not agree with the message of the Mushroom Council, therefore, because the Mushroom Council's message conflicts with United Foods' fundamental business strategy.

FURTHER THE AFFIANT SAITH NOT.

/s/ DONALD DRESSER
DONALD DRESSER

Sworn to and subscribed before me,

BARBARA H. (illegible)

a Notary Public,

this the 7th day of July, 1998.

My commission expires: April 2, 2001

EXHIBIT A

[Seal Omitted]

Annual Report

1997

[Seal Omitted] **MUSHROOM COUNCIL**

2200-B Douglas Blvd., Suite #220, Roseville, California 95661

Management Report

1997 was arguably the most exciting year for the Mushroom Council since its inception. However, the ratification of the Order in March of this year was even more exciting as well very gratifying. The overwhelming response of the industry in the referendum clearly is an indication that the Council should continue on the course it set, and with renewed vigor. Significant actions taken by the Council in 1997 include:

- The development of a new strategy by KDS Marketing based on their evaluation of the overall program and consumer research, resulting in the "Perfect Partner" slogan and logo. This theme will be carried-out in a more focused approach to promotion and will tie all facets of the program together.

- A TV ad campaign was put in place with three flights during the year on various cable networks. The results indicate that the ads raised consumer awareness of our product and reinforced the theme that mushrooms are the perfect partner.

- Continuation of ongoing programs are in the areas of consumer public relations, retail trade promotion and foodservice promotion. Again, in all three areas the new theme was incorporated into all the promotion materials and messages.

- The Pennsylvania Department of Agriculture again partnered with the Council and contributed a grant in the amount of $100,000. This

significantly strengthened the foodservice program and allowed for much broader coverage.

- The Strategic Plan was reviewed and modified during the year in light of the ajustments to the direction of the program. The plan has served the Council well as a guide, as well as, a measure of progress.

- Compliance audits were carried out on a random basis on both fresh producers, first handlers and exempt producers. The results indicate that overall compliance is generally good. These audits will continue to insure that those required to pay assessments, in fact, do comply with the Order.

- Assessments were collected on 542,650,000 pounds of domestically-produced fresh mushrooms and 15,448,444 pounds of fresh imports during the year. Overall this represents an increase over 1996 of 37,350,000 pounds, and 7.4%.

- The annual audit of the Mushroom Council resulted in the unqualified opinion of the auditors that the books and records are in good order, and that the financial statements fairly present the financial results of the operations. A copy of the audit report, detailing Mushroom Council activities, is included with this report.

Please feel free to contact the Mushroom Council office or any Council member should you require additional information or have any questions.

Thank you, and we look forward to renewed prosperity in the mushroom industry.

/s/ EDWARD A. LEO
EDWARD A. LEO,
Chairperson

/s/ WADE WHITFIELD
WADE WHITFIELD,
President and CEO

1997 Promotion and Research Program

Consumer Publicity Program

The 1997 consumer publicity program was designed to support and expand the reach of the Mushroom Council's product image—***"Fresh Mushrooms Make the Perfect Meal Companion"*** and educate consumers on the many ways to use and prepare fresh mushrooms. In all phases of the 1997 program—media placements, publicity events, collateral material—the *"Perfect Partner"* slogan/logo was incorporated.

During the year, five press releases supporting the *"Perfect Partner"* theme were distributed to 850 food-editors nationwide. The basic mailings included copy, recipes, color and Black and White photography. In addition, food editors also received a special memo describing the consumer research that led to the development of the *"Perfect Partner"* theme, an offer to send readers the menu planner leaflet, a copy of the official mushroom month proclamation and mushroom cultivation information. Also, in support of the *"Perfect Partner"* theme six placements were made with syndicated food writers whose columns are published in thousands of metro newspapers, as well as, two ready-to-print press releases with recipes and photos that ran in thousands of daily and weekly newspapers throughout the year.

A total of eight placements were made in food and consumer magazines in 1997. These included two full-color feature stories: one in *WOMAN'S DAY "Meals in Minutes"*; and the other in *HOME* magazine featuring mushroom recipes by Sacramento restaurateur Biba Caggiano.

Total potential readership for all editorial print placements including magazine readership was close to 170 million with an advertising cost equivalent of about $2 million if the space had been purchased for advertising.

Fourteen placements were made on National and Regional TV in 1997, most of them during ***National Mushroom Month*** in September. The NBC Today Show weatherman Willard Scott marked ***National Mushroom Month*** with a beautiful display of white mushrooms and an urging to "forage" in the supermarket. Regional TV Greengrocers Johnny Lerro, Michael Marks and Eric Sorensen also marked ***National Mushroom Month*** with spots that focused exclusively on white mushrooms. TV food chef "Mr. Food" showcased mushrooms on three of his nationally syndicated cooking vignettes. Noted cookbook author/ TV chef Nathalie Dupree served as spokesperson for the Mushroom Council in Atlanta, as did food historian/ author Betty Fussell on the ***TV FOOD NETWORK***. The ***HOME & GARDEN CHANNEL'S*** *"All in Good Taste"* devoted its 1/2 hour segment to mushrooms using information, recipe ideas and video footage supplied by the Mushroom Council. Burt Wolfe's *"A Taste for Travel"* in which fresh mushrooms were featured appeared three times on the ***TRAVEL CHANNEL*** during the year. Estimated potential viewership for all National and Regional TV placements was 68 million with an advertising cost equivalent of $1 million if the commercial airtime had been purchased.

Two recipe video releases were produced in 1997 and distributed to 125 TV Cable and broadcast stations to coincide with the first flight of the "*game show*" TV commercial. These two-minute cooking demos supported the "*Perfect Partner*" image with the logo appearing on the opening screen. Potential viewership is estimated at 23 million based on bounce-back cards and follow-up phone calls.

In addition to TV, a radio media tour was conducted during ***National Mushroom Month***. Renowned food authority/writer John Willoughby served as mushroom spokesperson on radio talk show interviews nationwide. He was heard on 60 stations, many in major markets including Los Angeles, New York and Boston.

National Mushroom Month placements were made on four major web sites on the internet in *1997 The AOL Cooking Club, Electronic Gourmet Guide, MSN's Cooking Forum and Mimi's Cyberkitchen.* All placements consisted of multiple screens of mushroom information and recipes graphically incorporating the "*Perfect Partner*" logo.

Two programs in 1997 were targeted to the food professionals: the **Mushroom Practicum** in New York City, and the ***Mushroom Memo*** newsletter.

The Practicum was a discussion/demonstration and tasting focusing on white mushrooms led by John Willoughby and his co-author chef, Chris Schlesinger. It was held at Peter Kump's Cooking School and attended by 50 food editors from such publications as *GOOD HOUSEKEEPING, REDBOOK* and *FOOD & WINE*, as well as, freelance and syndicated food writers. Feedback was positive with comments such as the one

from an editor at *GOOD HOUSEKEEPING*—"The information will find its way onto our magazine food pages."

During 1997, three issues of the ***Mushroom Memo*** newsletter, designed to keep fresh mushrooms top-of-mind, were distributed to approximately 1,000 food communicators.

Foodservice Promotional Program

The major objective of the ongoing foodservice program throughout 1997 was to increase fresh mushroom demand at both the distributor and operator levels. The target audience continued to be:

- Mid-scale Chain Operations
- White Tablecloth Independents
- Selected Contract Feeders
- Distributor Sales Representatives

The program elements included:

- Test Market Case Studies
- Collateral Material Development
- Ongoing Communications
  Newsletter
  Mushroom Council Web Page
- Trade Shows
- Trade Advertising
- Foodservice Public Relations

Four case studies were conducted in 1997. The purpose of the studies were to develop operator testimonials as to the profitability of fresh mushrooms. Sizzler, Inc. with 261 units participated in a national promotion during the fall quarter. The goal of the promotion was to increase ticket totals. **A *Top Your Steak*** promotion in which *Burgundy Mushrooms* were offered as an upsell on all steak orders resulted in permanent placement of the *Burgundy Mushrooms* on the menu. A second promotion was conducted with Garfield's Restaurants, a mall-based Southern and Midwest Region midscale chain. A *Mushroom Stuffed Steak* was offered that was higher in price than regular menu items. Ticket averages increased with many regular customers buying the *Mushroom Stuffed Steak.* The chain continued to use fresh white mushrooms to upsell ticket totals. The test included all 48 Garfield's units.

Flik International, a contract feeder servicing mainly B&I clients on the East Coast conducted a November promotion using fresh white mushrooms. A direct quote from one of the participating units stated, "*Interest and enthusiasm sparked by the use of fresh mushrooms far surpassed our expectations. We used them across the menu—grill line, hot food line, salad bar and take out service.*"

The Cadillac Ranch in Denver, Colorado conducted a ***Mushroom Madness*** promotion featuring special appetizers. The independent restaurant has made their mushroom appetizers a permanent menu item due to a 10 percent increase in customer sales.

New collateral material added to the Mushroom Council resource kit. Several new pieces included the ***Proof Is In the Profits*** fact sheet series, the ***Cost-per-Serving***

Breakdown reference piece and a training video handout as an accompaniment to the existing foodservice video.

Ongoing distributor education included the quarterly foodservice newsletter renamed "***Shedding Light on Fresh Mushrooms***". The publication was distributed to 1,000+ distributor representatives quarterly.

Trade shows included: the Pizza Expo, National Restaurant Association Show and the PMA Foodservice Conference.

Foodservice advertising focused on case studies conducted in 1996. A full-page ad based on the Harris Ranch case study was placed in *RESTAURANT BUSINESS, FOODSERVICE NEWSLETTER* and *PRODUCE SOLUTIONS.*

Foodservice publicity placements were seen in nine publications including *CHEF, CHEERS, COOKING FOR PROFIT, PIZZA TODAY, PRODUCE SOLUTIONS, RESTAURANT BUSINESS, RESTAURANT HOSPITALITY, FOOD MANAGEMENT* and *FOODSERVICE DIRECTOR* magazines.

Mushroom Council/Pennsylvania Joint Promotion

A joint promotion between the Mushroom Council and the Pennsylvania Fresh Promotion Committee was a part of the 1997 foodservice program. The Pennsylvania Department of Agriculture provided a $100,000 grant through the Pennsylvania Fresh Promotion Committee which was matched by $220,000 of Council funds to expand the overall foodservice program to $320,000.

The foodservice promotion category was evaluated as an area to benefit by the additional funds.

Retail Trade Promotion Program

A number of new sales support tools were tested and introduced in 1997. All of these new elements were created under the "*Blueprint for Profit*" banner.

The trade promotion program has two principal areas of responsibility: keeping retailers focused on the profit potential represented by fresh mushrooms and reminding shoppers while in store, to add mushrooms to their purchases.

To keep retailers focused on mushrooms, a number of sales support programs were developed on behalf of the industry. Two new full-page ads were developed to reinforce key selling points. The first offered a data disk that permitted users to determine the optimum balance between their price paid, price sold and the resulting gross margin. The disk includes data from an actual (but unidentified) chain so that the disk user can see how the data was entered and analyzed, as well as,

a template for them to use to confirm their own experience.

The second ad reported the results of a test that was designed to determine the sales results from adding a second location of sliced mushrooms in the fresh-cut salad section. The test chain experienced just over a 10 percent sales increase as a result of this new facing in a secondary location.

The trade ads were supported by a series of press releases that went out through the year, as well as, by a semi-annual retailer newsletter that ran as an insert in *Produce Merchandising.*

As new materials were developed, they were sent by direct mail to a list of nearly 400 V.P.-level produce buyers and merchandisers. An accompanying order form encouraged recipients to send for quantities of these free materials for in-store use. Two particularly popular tools were a slide rule to help determine mushroom profitability and a CD-ROM that contains all of the graphics needed to produce retail Best Food Day ads.

The fresh mushroom story was presented at a number of industry gatherings. These events included sponsorship of an Eastern Produce Council dinner, Fresh Produce Council (Southern California) luncheon, and a New England Fresh Produce Council dinner meeting. In addition, we had a booth at PMA and Fresh Produce Retail Expo and attended the Annual Produce Conference and Mexican-American Grocers' Convention.

Our in-store shopper communication program continues to rely heavily on in-store radio. Every 15 minutes the

music in the store stops and shoppers are reminded that fresh mushrooms go with almost everything. The voice and copy strongly reinforce the cable television campaign "*Perfect Partner*" message, in an effort to build additional awareness for the positioning. Sales data was collected from a Southern California chain that consistently reports an average 10 percent month-to month increase in fresh mushroom sales. . . which they principally attribute to the in-store radio.

The Council continues to gather fresh mushroom sales trend data from six cooperating retailers across the country. Inferences that can be drawn from these data will be compiled and shared with the industry during the 1998 year.

To better conform to the new positioning for "*Fresh mushrooms—The Perfect Partner*" the retail trade program will change from "*Blueprint for Profit*" to "*Partners in Profit.*" This solidly supports the "*Perfect Partner*" theme.

Council Web Site

By the end of 1997, more than 15,000 visitors had accessed the Council web-site. It contains product information, color and B & W line art, recipes and consumer information to help users find new ways to use fresh mushrooms. It also contains information for food-service users, educators, and the consumer press. The site location is ***www.mushroomcouncil.com***.

Consumer Image Promotion Program

The major marketing research effort conducted by the Council in 1996 and 1997 resulted in our product

position, the foundation for all consumer promotion of fresh mushrooms. Consumers believe that fresh mushrooms "make the perfect meal companion" and when reminded of this position in image advertising and public relations, are motivated to increase their consumption of our product. The 1997 Consumer Image Program was implemented to achieve this singular goal—increase consumer awareness that fresh mushrooms are "*The Perfect Partner*" for almost anything.

The cornerstone of the 1997 promotion was a television advertising campaign. Built on "*The Perfect Partner*" strategy and other research on creative impact, two versions of a TV commercial were produced in the first quarter. A "game show" design played off the success of "*Family Feud*" type programming and drove home the key product benefit of versatility. One, thirty-second (standard TV time) spot to establish the primary image was supplemented by a ten-second version to increase frequency and maximize the media budget.

The total TV campaign consisted of three separate flights of advertising during the year, running on six national cable networks. Launched in the spring for a four-week period, the commercials were re-aired for two weeks to support summer sales and ran another four-week period during the fall. Over twenty-five percent (25%) of our total target audience of fifty-two million women saw our commercial over three times (on average) on *TNT*, *TBS*, *DISCOVERY*, *LIFETIME*, *THE LEARNING CHANNEL* and THE FOOD NETWORK.

Another key element of the consumer promotion program was integration. Wherever and whenever a consumer saw or heard a fresh mushroom message, it

was based on "*The Perfect Partner*" image. Integration increases the impact and efficiency of the overall program. Supporting the television campaign, a meal planner was developed to help our consumers who more and more struggle with the decision over "What's for dinner?", make those decisions while shopping. Over a million brochures providing quick and easy recipes were delivered to retailers coordinated with the TV flights. In addition, three retail mailings were sent to key decision makers announcing the next wave of promotional support by the Council to encourage coordination of their in-store programs for fresh mushrooms. Producers received each announcement to retailers and received a weekly schedule on the Council's FAX Alert.

The goal of the 1997 image promotion to increase consumer awareness of our product position was measured by an Advertising Tracking Study. This standard marketing research tool, employing a telephone questionnaire methodology, was implemented prior to the spring launch of the program. Benchmark numbers were collected on a variety of parameters including usage and attitudes, as well as, general and specific awareness of our promotional message. The study was repeated in the fall after conclusion of our program. Final analysis showed a twenty-five percent (25%) increase in audience attitude and consumption of fresh mushrooms. "*The Perfect Partner*" image is helping achieve our industry goal to increase consumption of fresh mushrooms.

Crisis Management

The Council developed a comprehensive crisis management plan in early 1996. The purpose is to have a well

thought-out plan in place in case of any situation that might arise that would erode the confidence of consumers in fresh mushrooms that are consumed in the household or in eating establishments away from home.

The plan includes a management team that would immediately swing into action. The team consists of Council management and appropriate experts in all fields related to a given crisis. Lists of retailers, wholesalers, foodservice distributors and operators, federal and state health organizations and others deemed appropriate to bring on to the team are maintained.

The plan positions the Mushroom Council as the organization to take the lead in situations effecting the industry.

1997 Council Members

Ed Leo, Chairperson* ..... John C. Leo & Son	Region 2
Shah Kazemi, Vice-Chairperson** ..... Monterey Mushrooms, Inc.	Region 3
William K. Street, Treasurer ..... Ostrom Mushroom Farms	Region 3
Virgil Jurgensmeyer, Secretary ..... J-M Farms	Region 4
James Angelucci ..... Phillips Mushrooms	Region 2
Roger Claypoole ..... Creekside Mushrooms, Ltd.	Region 2
Wihelm W. Meya ..... Franklin Mushrooms, Inc.	Region 1
Dr. Robert E. Miller*** ..... Campbell's Fresh, Inc.	Region 1
C. Douglas Tanner ..... Sunrise Mushrooms	Region 3

---

* Assumed Chairperson responsibilities on August 1, 1997.

** Elected Vice-President-Chairperson on July 31, 1997.

*** Resigned as Chairperson and Council member on July 31, 1997.

Council Staff

Wade A Whitfield; President
Robyn Cuevas, Public Relations Director
Lisa Champney, Office Manager

NOTE-STATES BY REGION:

REGION 1 - Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Ohio, Kentucky, Indiana, Michigan, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Minnesota, North Dakota, South Dakota, Montana, Colorado, and Wyoming.

REGION 2 - Pennsylvania, Delaware, New Jersey, the District of Columbia, West Virginia, Virginia, and Maryland.

REGION 3 - Washington, Oregon, Idaho, Utah, Arizona, California, Nevada, Alaska, and Hawaii.

REGION 4 - New Mexico, Texas, Oklahoma, Arkansas, Louisiana, Alabama, Mississippi, Georgia, Tennessee, North Carolina, South Carolina, Florida, Puerto Rico.

TENNEY AND COMPANY

Certified Public Accountants

INDEPENDENT AUDITORS' REPORT

We have audited the accompanying general purpose financial statements of the Mushroom Council, an instrumentality of the United States Department of Agriculture, as of December 31, 1997, as listed in the table of contents. These financial statements are the responsibility of the Mushroom Council's management. Our responsibility is to express an opinion on these financial statements based on our audit.

We conducted our audit in accordance with generally accepted auditing standards and Government Auditing Standards, issued by the Comptroller General of the United States. These standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentations. We believe that our audit provides a reasonable basis for our opinion.

In our opinion, the general purpose financial statements referred to above present fairly, in all material respects, the financial position of the Mushroom Council as of December 31, 1997 and the results of its opera-

tions for the year then ended in conformity with generally accepted accounting principles.

March 18, 1998

Tenney and Company

1130 Civic Center Blvd. Ste. C Yuba City, California 95993
(530) 674-4211 Fax (530) 674-4215

MUSHROOM COUNCIL
BALANCE SHEET
AS OF DECEMBER 31, 1997

	General Fund	General Fixed Assets Account Group	December 31, 1997
ASSETS			
Cash	$ 668,184	$	$ 688,184
Accounts receivable	291,977		291,977
Fixed assets		28,185	28,185
Total Assets	$ 960,161	$ 28,185	$ 988,346
LIABILITIES AND FUND EQUITY			
Accounts payable	$ 128,843	$	$ 128,843
Deferred compensation	364		364
Due to USDA (see Note 6)	73,990		73,990
Total liabilities	203,197		203,197

Fund Equity:			
Investments in general fixed assets		28,185	28,185
Reserve for encumbrance	18,521		18,521
Fund Balance:			
Unreserved	738,443	____	738,443
Total fund equity	756,964	28,185	785,149
Total Liabilities and Fund Equity	$ 960,161	$ 28,185	$ 988,346

The notes to the financial statements are an integral part of this statement.

See accompanying independent auditors' report.

MUSHROOM COUNCIL
COMBINED STATEMENT OF REVENUES,
EXPENDITURES AND CHANGES IN FUND BALANCES
FOR THE YEAR ENDED DECEMBER 31, 1997

	General Fund
Revenues	
Assessments	
Domestic	$ 2,483,902
Imports	69,518
Interest	10,013
Product sales	25,654
Miscellaneous	10,368
Grants	100,000
Total revenues	2,699,455
Expenditures	
Conferences/conventions	12,670
Industry program support	12,250
Office expense	68,709
Other operating expense	30,768
Payroll costs including taxes	155,474
Promotions - staff cost	96,442
Professional services (including compliance audits)	39,975
Promotion programs	1,094,658
Product, image development	638,297
Travel	44,719
Government expenses (see Notes 6 & 7)	57,871
Crisis management	4,017
Industry materials production	15,405
Program evaluations	36,251
Total expenditures	2,307,506

Excess of revenues over (under) expenditures	391,949
Fund balance unreserved December 31, 1996	349,015
Fund balance unreserved – subtotal	740,964
Increase in reserve for encumbrances	(2,521)
Fund Balance Unreserved December 31, 1997	$ 738,443

The notes to the financial statements are an integral part of this statement.

See accompanying independent auditors' report.

MUSHROOM COUNCIL
COMBINED STATEMENT OF REVENUES, EXPENDITURES AND CHANGES IN FUND BALANCES - BUDGET AND ACTUAL FOR THE YEAR ENDED DECEMBER 31, 1997

	Actual	Budget	Variance Favorable (Unfavorable)
Revenues			
Assessments			
Domestic	$ 2,483,902	$ 2,300,000	$ 183,902
Imports	69,518	54,000	15,518
Interest	10,013	10,000	13
Product sales	25,654	25,000	654
Miscellaneous	10,368	5,000	5,368
Grants	100, 000	100,000	____
Total revenues	$ 2,699,455	$ 2,494,000	$ 205,455
Expenditures			
Conferences/ conventions	12,670	11,000	(1,670)
Industry program support	12,250	12,550	300
Office expense	68,709	70,700	1,991
Other operating expense	30,768	34,300	3,532
Payroll – including taxes	155,474	158,500	3,026
Promotions – staff cost	96,442	114,400	17,958
Professional services	39,975	51,000	11,025
Promotion programs	1,094,658	1,077,000	(17,658)

Product image development	638,297	628,000	(10,297)
Travel	44,719	52,000	7,281
Government expenses (see Notes 6 & 7)	94,913	151,657	56,744
Crisis management	4,017	5,000	983
Industry materials production	15,405	10,000	(5,405)
Research	36,251	50,000	13,749
Program evaluation		50,000	50,000
Promotion/ contingency reserves		422,469	422,469
Total expenditures	2,344,548	2,898,576	554,028
Excess of revenues over (under) expenditures	354,907	(404,576)	759,483
Add back USDA startup fee debt payments in 1997 included above in Government Expenses	37,042		37,042
Fund balance unreserved December 31, 1996	349,015	349,015	___
Fund balance unreserved - subtotal	740,964	(55,561)	796,525

Increase in reserve for encumbrances	(2,521)		(2,521)
Fund Balance Unreserved December 31, 1997	$ 783,443	($ 55,561)	$ 794,004

The notes to the financial statements are as integral part of this statement.

SEE ACCOMPANYING INDEPENDENT AUDITORS' REPORT.

MUSHROOM COUNCIL
NOTES TO THE FINANCIAL STATEMENTS
DECEMBER 31, 1997

The accounting methods and procedures adopted by the Mushroom Council conform to generally accepted accounting principles as applied to governmental entities. The following notes to the financial statements are an integral part of the Mushroom Council's General Purpose Financial Statements.

1. Summary of Significant Accounting Policies

Financial Reporting Entity

The Mushroom Council is authorized by the Mushroom Promotion, Research, and Consumer Information Act of 1990 (P.L. 101-624). The Council is considered an instrumentality of the U.S. Department of Agriculture which conducts the administrative oversight of its activities.

The Council commenced activity in August of 1993. The Council is funded by assessments collected from producers and importers who produce or import, on average, over 500,000 pounds of mushrooms annually that are marketed or imported for fresh use. The Council was formed for the purpose of mushroom promotion, research and to provide consumer information. The Council is governed by a board appointed by the Secretary of Agriculture. The board consists of at least four members, but not more than nine.

Basis of presentation—fund accounting. The accounts of the Mushroom Council are organized on the basis of funds and account groups, each of which is considered a separate accounting entity. The Council has a General Fund and a Fixed Asset Account Group. Each fund is accounted for by a separate set of self-balancing accounts that comprise its assets, liabilities, fund balance, revenues, and expenditures/expenses. Individual funds account for the governmental resources allocated to them for the purpose of carrying on specific activities in accordance with laws, regulations, or other restrictions.

General Fund: This fund is established to account for resources devoted to financing the general services of the Council. General assessments and other sources of revenue used to finance the fundamental operations of the Council are included in this fund. The fund is charged with all costs of operating the government entity for which a separate fund has not been established.

General Fixed Assets Account Group: This is not a fund but rather an account group that is used to account for general fixed assets acquired principally for general purposes and excludes fixed assets in any Enterprise Funds or Internal Service Funds.

Basis of accounting Governmental funds use the modified accrual basis of accounting. Under this method, revenues are recognized in the accounting period in which they become both available and measurable (flow of current financial resources measurement focus). Miscellaneous revenues are re-

corded as revenues when received in cash. Assessments and investment earnings are recorded when earned (when they are measurable and available). Expenditures are recognized in the accounting period in which the fund liability is incurred, if measurable.

Budgets and the budgetary process. The Council adopts an annual operating budget, which can be amended by the Council, with USDA approval, throughout the year. Formal budgetary accounting is employed as a management control for all funds of the Council. For each of the funds for which a formal budget is adopted, the same basis of accounting is used to reflect actual revenues and expenditures recognized on the basis of generally accepted accounting principles.

Receivables. All receivables are reported at their gross value and, where appropriate, are reduced by the estimated portion that is expected to be uncollectible.

Property, plant, and equipment. Fixed assets used in governmental fund type operations are accounted for in the General Fixed Assets Account Group. Public domain (infrastructure) general fixed assets consisting of certain improvements other than buildings, such as roads, sidewalks, and bridges, are not capitalized. Property, plant, and equipment acquired or constructed for general governmental operations is recorded as an expenditure in the fund making the expenditure and capitalized at cost in the General Fixed Assets Account Group.

Fund Equity. The unreserved fund balances for governmental funds represent the amount available for budgeting future operations. The reserved fund balances for governmental funds represent the amount that has been legally identified for specific purposes. Unreserved retained earnings for proprietary funds represent the net assets available for future operations or distribution. Reserved retained earnings for proprietary funds represent the net assets that have been legally identified for specific purposes.

The reserve for encumbrances was created to represent encumbrances outstanding at the end of the year based on purchase orders and contracts signed by the Council but not completed as of the close of the fiscal year.

Revenues and expenditures/expenses. Revenues for governmental funds are recorded when they are determined to be both measurable and available. Generally, tax revenues, fees, and nontax revenues are recognized when received. Grants from other governments are recognized when qualifying expenditures are incurred. Expenditures for governmental funds are recorded when the related liability is incurred.

2. Cash

At December 31, 1997, the Council had deposited with Bank of America:

Checking Account	$ 12,058

Savings	656,126
Total	$ 668,184

All bank deposits as of the balance sheet date are insured or collateralized with securities held by the Council's agent and approved by the USDA.

3. Accounts Receivable

At December 31, 1997 receivables consisted of assessments primarily for December's sales of mushrooms by handlers. All the receivables were subsequently collected in January and February of 1998.

4. Property, Plant and Equipment

	Balance 12/31/96	Additions	Deletions	Balance 12/31/97
Equipment	$ 28,185	$___	$___	28,185

5. Operating Lease

The Council is obligated under certain leases accounted for as operating leases. Operating leases do not give rise to property rights or lease obligations, and therefore, the results of the lease agreements are not reflected in the Council's account groups. The following is a schedule of future minimum rental payments required under operating leases that have initial or remaining noncancelable lease terms in excess of one year as of December 31, 1997:

	Pitney Bowes Postage Meter	Office Building
1998	$ 586	$ 31,416
1999	-0-	10,576
2000	-0-	-0-
2001	-0-	- 0-
Total Remaining	$ - 0-	$ -0-

6. Due to USDA

The USDA incurred initial start up costs during 1991 through 1993 totaling $277,717 to create the Mushroom Council. The Council has arranged with the USDA to pay these costs back over a sixty month period. At the balance sheet date, $73,990 remained to be paid as follows:

	Minimum Payments
1998	$73,990
Total Remaining	$ - 0 -

7. Government Expenses

AMS User Fees:	
Paid as of 12/31/97	$ 50,245
US Customs General Counsel User Fees	
Paid as of 12/31/97	618
Total Expenses For 1997	50,863

AMS User Fees:	
Paid in 1997 for 1996	7,008
	57,871
Government Implementation Repay:	
Paid in 1997	37,042
	94,913
Compliance auditing services paid in 1997 - included in professional services	31,000
Costs Paid During 1997	$ 125,913

For budget purposes, government implementation funds to be repaid in a year are included in the budget. Therefore, for the comparison of budget and actual cost, actual government implementation funds (Due to USDA) are included in expenses and adjusted in the fund balance section of page 4.

8. Encumbered Funds

Due to USDA - 1997 - Paid in 1998 $ 18,521

Mushroom Council makes the requisite payments to USDA as they are billed by USDA. Four payments for 1997 totaling $18,521 were billed to the Council after December 31, 1997.

9. Subsequent Events

Two producer-handlers have filed administrative adjudicatory actions under 7 U.S.C. 6106 challenging the whole program on constitutional

grounds. Subsequently, the U.S. Supreme Court has ruled in favor of the Mushroom Council law. However, the specific actions noted herein are in the process of working their way through the appeals process. The accounts receivable on Page 2 of this report do not include amounts due from the two parties who have challenged the constitutionality of the Mushroom Council.

JAN 24 2001

Supreme Court, U.S.
FILED
JAN 24 2001
CLERK

No. 00-276

In the Supreme Court of the United States

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS

v.

UNITED FOODS, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONERS

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Counsel of Record

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Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

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QUESTION PRESENTED

Whether the assessments imposed pursuant to the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. 6101 *et seq.*, on members of the mushroom industry for advertising programs designed to support the industry violate the First Amendment.

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In the Supreme Court of the United States

No. 00-276

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS

v.

UNITED FOODS, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 197 F.3d 221. The opinion of the district court (Pet. App. 10a-21a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1999. A petition for rehearing was denied on March 23, 2000 (Pet. App. 22a-23a). On June 9, 2000, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including July 21, 2000, and, on July 13, 2000, Justice Stevens further extended that time to and including August 18, 2000. The petition for a writ of certiorari was filed on August

18, 2000, and was granted on November 27, 2000. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech * * *.

2. The relevant provisions of the Mushroom Promotion, Research, and Consumer Information Act of 1990, Subtitle B of Title XIX of the Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, §§ 1921-1933, 104 Stat. 3854-3865 (7 U.S.C. 6101 *et seq.*) are reproduced at Pet. App. 24a-28a.

STATEMENT

This case concerns the constitutionality of a generic advertising program for fresh mushrooms that is similar to the generic advertising programs for California tree fruits upheld in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997). The court of appeals held, however, that the mushroom advertising program violates the First Amendment, distinguishing *Wileman Brothers* on the ground that mushrooms are not subject to federal regulation that is as extensive as that applicable to California tree fruits. Pet. App. 1a-9a.

1. a. Congress enacted the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. 6101 *et seq.* (Mushroom Act), after making a series of findings set forth in the Act itself. See 7 U.S.C. 6101(a)(1)-(7). Of particular relevance to this case, Congress found that "the maintenance and expansion of existing markets and uses" for mushrooms are "vital to the welfare of producers and those concerned

with marketing and using mushrooms, as well as to the agricultural economy of the Nation." 7 U.S.C. 6101(a)(5). Congress further found that "the cooperative development, financing, and implementation of a coordinated program of mushroom promotion, research, and consumer information are necessary to maintain and expand existing markets for mushrooms." 7 U.S.C. 6101(a)(6). The Mushroom Act therefore declares it to be "the policy of Congress that it is in the public interest" to establish an orderly program for developing, financing through adequate assessments on mushroom producers and importers, and carrying out an "effective, continuous, and coordinated program of promotion, research, and consumer and industry information" designed to "strengthen the mushroom industry's position in the marketplace," "maintain and expand existing markets and uses for mushrooms," and "develop new markets and uses for mushrooms." 7 U.S.C. 6101(b).

The Mushroom Act authorizes the Secretary of Agriculture to issue an order establishing a Mushroom Council and vesting it with authority to implement the statutory policy. See 7 U.S.C. 6104(b) and (c).[1] In particular, the Act provides that the powers and duties of the Mushroom Council shall include "propos[ing], receiv[ing], evaluat[ing], approv[ing] and submit[ting] to the Secretary for approval * * * budgets, plans, and projects of mushroom promotion, research, consumer information, and industry information." 7 U.S.C.

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[1] The Mushroom Act provides that the Mushroom Council is to be composed of between four and nine members, all of whom are to be selected by the Secretary from among persons nominated by mushroom producers and importers. 7 U.S.C. 6104(b)(1) and (2).

6104(c)(4).[2] The Act specifies that the Council may not implement any such plan, project, or budget unless it is approved by the Secretary. 7 U.S.C. 6104(d)(3).

The Mushroom Act provides that the activities of the Mushroom Council are to be funded through assessments collected from producers and importers of mushrooms for the domestic fresh market. 7 U.S.C. 6104(g)(1)(A) and (B).[3] The rate of assessment is determined by the Mushroom Council subject to approval by the Secretary. 7 U.S.C. 6104(g)(2); 7 C.F.R. 1209.51(b). The assessments cannot exceed certain ceilings set by the Act; the currently applicable ceiling is one cent per pound of mushrooms. 7 U.S.C. 6104(g)(2)(D). The Act expressly prohibits the use of the assessments "in any manner for the purpose of influencing legislation or governmental action or policy." 7 U.S.C. 6104(h).[4]

b. The Mushroom Act was included in the Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359, by means of a Senate floor amendment authorizing similar promotion programs for a number of agricultural commodities. See 136 Cong. Rec. 19,511 (1990) (statement of Sen. Fowler, sponsor of the amendment) ("The amendment authorizes new programs for soybeans, fresh mushrooms, limes, and pecans. It makes important modifications to

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[2] The Mushroom Act also provides that the Mushroom Order shall vest the Mushroom Council with the authority "to develop and propose to the Secretary voluntary quality and grade standards for mushrooms." 7 U.S.C. 6104(c)(5).

[3] The amount of the assessment is based on the quantity of mushrooms produced or imported. 7 U.S.C. 6104(g)(2).

[4] The Mushroom Act vests the federal district courts with "jurisdiction specifically to enforce, and to prevent and restrain any person from violating, any order or regulation made" under the Act. 7 U.S.C. 6107(a).

existing programs for cotton, potatoes, honey, and Vidalia onions."). See Pub. L. No. 101-624, Title XIX, §§ 1901-1998, 104 Stat. 3838-3914.

The congressional supporters of the amendment characterized such programs as "self-help" measures that are "funded and administered entirely by producers with oversight by the Secretary of Agriculture." 136 Cong. Rec. at 19,511 (statement of Sen. Fowler); accord *id.* at 19,513 (statement of Sen. Cochran). They recognized that such programs, by enabling producers "to unite on a national level to conduct effective marketing and research activities for their products," had "proven extremely successful in maintaining and expanding existing markets, and developing new markets and uses for our commodities." *Id.* at 19,511 (statement of Sen. Fowler); see also *id.* at 19,512 (statement of Sen. McCain) (noting that such programs "have been very successful in assisting our farmers and ranchers in promoting the benefits of their products"). Congressional supporters also noted that the effectiveness of such programs could be undermined if all but the smallest producers of a commodity were not required to pay their "fair share." *Id.* at 19,512 (statement of Sen. McCain); accord *id.* at 19,511-19,512 (statement of Sen. DeConcini).

Senator Heinz, in specifically addressing the mushroom program, emphasized that such programs reflect "an attempt to design a marketing order that respects our tradition of free trade," as opposed to marketing orders that, for example, engage in "the artificial bolstering of indigenous industries by exclusionary measures." 136 Cong. Rec. at 19,614. "Unlike other proposals," he explained, a generic promotion program "does not seek to restrict a given market to the unfair advantage of certain U.S. businesses, but rather to

enlarge that market, allowing everyone to benefit." *Ibid.*[5]

c. The Secretary of Agriculture issued an order, pursuant to the Mushroom Act, that became effective in 1993. See 7 C.F.R. Pt. 1209 (Mushroom Order). Before the Mushroom Order took effect, the Secretary submitted the Order to a referendum of mushroom producers and importers, as required by the Act. 7 U.S.C. 6105(a)(1).

The Mushroom Act required the Secretary to conduct a second such referendum after the Mushroom Order had been in effect for five years. 7 U.S.C. 6105(b)(1)(A). In that referendum, which was conducted in 1998, a substantial majority of mushroom producers and importers voted to retain the Order. Pet. App. 15a.[6] The Secretary is authorized to conduct additional referenda on the Order if 30% of mushroom producers and importers request one. 7 U.S.C. 6105(b)(1)(B). In addition, if the Secretary at any time "finds that the order * * * obstructs or does not tend to effectuate the declared policy" of the Act, the

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[5] Senator Specter, also addressing the provisions of the amendment authorizing a mushroom promotion program, noted that "this amendment is supported by the overwhelming majority of the fresh mushroom industry." 136 Cong. Rec. at 19,513. Senator Heinz identified respondent, which he described as "a food conglomerate based in Tennessee," as "[t]he chief opponent" of the amendment. *Id.* at 19,614.

[6] In 1998, 80% of those voting in the referendum, representing 70% of the volume of mushrooms produced by all those who voted, favored the continuation of the Mushroom Order. Agricultural Mktg. Serv., United States Dep't of Agric., *Mushroom Indus. Votes to Continue Promotion Program*, Release No. AMS-071-98 (Mar. 20, 1998) (J.A. 79-80).

Secretary is required to terminate or suspend the Order. 7 U.S.C. 6110.

d. Congress subsequently enacted the Federal Agricultural Improvement and Reform Act of 1996 (FAIR Act), Pub. L. No. 104-127, 110 Stat. 888. That Act, *inter alia*, elaborates on the findings made by Congress in enacting other statutes, specifically including the Mushroom Act, that authorize generic commodity promotion programs. See 7 U.S.C. 7401(a)(10).[7] In the FAIR Act, Congress confirmed that such programs are, as reflected in the provisions of the Mushroom Act, industry "'self-help' mechanisms" subject to the "supervision and oversight of the Secretary of Agriculture." 7 U.S.C. 7401(b)(8); see also 7 U.S.C. 7401(b)(1) (describing such programs as "Government-supervised"). Congress also declared in the FAIR Act that such programs are appropriately funded by producers and processors, "who most directly reap the benefits of the programs." 7 U.S.C. 7401(b)(2).

Congress found that such programs advance the interests of agricultural producers by "utilizing promotion methods and techniques that individual producers and processors typically are unable, or have no incentive, to employ." 7 U.S.C. 7401(b)(7). In addition, Congress found that such programs are of "particular benefit to small producers," who may "lack the resources or market power to advertise on their own" and may be "unable to benefit from the economies of scale available in promotion and advertising." 7 U.S.C. 7401(b)(10). Congress noted that the Mushroom Act and the other commodity promotion laws "were neither designed nor intended to prohibit or restrict, and the

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[7] All citations of provisions of the FAIR Act are of 7 U.S.C. (Supp. IV 1998).

promotion programs established and funded pursuant to these laws do not prohibit or restrict, individual advertising or promotion of the covered commodities by any producer, processor, or group of producers or processors." 7 U.S.C. 7401(b)(4).

2. Respondent United Foods, Inc., a mushroom producer, has refused since 1996 to pay its assessments under the Mushroom Act and the Mushroom Order. See Pet. App. 15a. Instead, respondent filed a petition with the Secretary of Agriculture, pursuant to 7 U.S.C. 6106(a)(1)(A), claiming that the Mushroom Act, the Mushroom Order, and the assessments imposed thereunder violate the First Amendment. See J.A. 27. The United States then filed an action against respondent in the United States District Court for the Western District of Tennessee, pursuant to 7 U.S.C. 6107(a), seeking to enforce the terms of the Mushroom Order and to require respondent to comply with it. J.A. 55-60. The two matters were stayed pending this Court's resolution of *Wileman Brothers*. Pet. App. 11a.

After the decision in *Wileman Brothers*, the administrative law judge assigned to respondent's case dismissed the petition. J.A. 27-31. The administrative law judge concluded that *Wileman Brothers* "is dispositive of the issues herein," rejecting respondent's attempt to distinguish *Wileman Brothers* on the ground that "the peach and nectarine marketing orders at issue there regulated other aspects of the market, and did not have promotion as their sole purpose." J.A. 28.

The Judicial Officer of the Department of Agriculture affirmed. J.A. 32-54. The Judicial Officer explained that the Mushroom Act and the Mushroom Order "have the very same three characteristics which the Court found dispositive of the First Amendment issue in [*Wileman Brothers*]." J.A. 43. Specifically, the Judicial

Officer explained, the Mushroom Act and the Mushroom Order do not prohibit respondent from communicating any message to any audience, do not compel respondent to speak or to be publicly associated with the Mushroom Council's promotion program, and do not compel respondent to finance any political or ideological views. J.A. 43-46.

Respondent then filed a complaint in district court, seeking review of the Judicial Officer's decision. The district court consolidated that action with the United States' enforcement action, and granted the United States' motions for summary judgment. Pet. App. 10a-21a. The court held that *Wileman Brothers* "is clearly dispositive of [respondent's] First Amendment challenge to the [Mushroom Act] and the Order." *Id.* at 18a. The court rejected respondent's effort to distinguish *Wileman Brothers* on the ground that the mushroom industry is not as extensively regulated as the California tree fruit industries. The court reasoned that *Wileman Brothers* "did not turn on the degree to which [the] State or Federal Government has otherwise displaced free market competition"; rather, the court understood *Wileman Brothers* as holding that "compelled participation in a generic advertising program is itself a form of economic regulation whose efficacy is to be judged by legislatures, Government officials and producers, and not by the Court." *Ibid.* (quoting *Matsui Nursery, Inc.* v. *California Cut Flower Comm'n*, No. S-96-1092 EJG-GGH (E.D. Cal. Aug. 6, 1997)).

3. The United States Court of Appeals for the Sixth Circuit reversed. Pet. App. 1a-9a. The court concluded that the Mushroom Act and the Mushroom Order violate the First Amendment to the extent that they require mushroom producers and importers to pay an

assessment for a generic advertising program. *Id.* at 8a.

The court of appeals read *Wileman Brothers* as holding that a generic advertising program funded by mandatory assessments must satisfy two conditions in order to withstand constitutional scrutiny: first, the advertising must be "germane[] to a valid, comprehensive, regulatory scheme," and, second, the advertising must be "nonideological." Pet. App. 6a. The panel noted that *Wileman Brothers* had emphasized that the generic advertising programs for California tree fruits possessed both characteristics—that is, the advertising programs were "part of a broader collective enterprise in which [the producers'] freedom to act independently is already constrained by the regulatory scheme" and were "not used to fund ideological activities." Pet. App. 5a-6a (quoting *Wileman Bros.*, 521 U.S. at 469, 473).

The court of appeals was of the view that mandatory advertising assessments are justified in an extensively regulated industry, but not otherwise, in order to prevent members of the industry from "tak[ing] advantage of their monopoly power resulting from regulation of price and supply without paying for whatever commercial benefits [they] receive at the hands of the government." Pet. App. 7a-8a. The court found support for such a "principle of reciprocity" in *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991), which involved compelled contributions to a public-employee union in the context of an "agency-shop" arrangement. Pet. App. 8a.

The court of appeals then applied its two-part test to the generic advertising program established by the Mushroom Act and the Mushroom Order. Pet. App. 8a. The court did not suggest that the generic advertising program compels members of the mushroom industry

to fund ideological activities. But the court nonetheless concluded that, because the generic advertising program is not part of a comprehensive scheme of regulation of the mushroom industry, the program violates the First Amendment to the extent that it imposes assessments on members of the industry to fund the advertising. *Ibid.*

SUMMARY OF ARGUMENT

I. The generic advertising program established under the Mushroom Act and the Mushroom Order is fully consistent with the First Amendment under this Court's decision in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997). For the same three reasons that the Court identified with respect to the generic advertising programs for California tree fruits in *Wileman Brothers*, the generic advertising program for mushrooms is unlike laws that have been held to violate the freedom of speech protected by the First Amendment: It "impose[s] no restraint on the freedom of any producer to communicate any message to any audience"; it "do[es] not compel any person to engage in any actual or symbolic speech"; and it "do[es] not compel the producers to endorse or to finance any political or ideological views." *Id.* at 469-470. Instead, like the peach, plum, and nectarine handlers in *Wileman Brothers*, respondent and other mushroom producers are merely required to share the costs of promotional activities that are non-ideological and "unquestionably germane to the purposes," *id.* at 473, identified by Congress in the Mushroom Act, *i.e.*, to maintain and expand the existing markets for their product and to create new markets and uses for that product, 7 U.S.C. 6101(b).

The court of appeals erred in distinguishing this case from *Wileman Brothers* on the ground that mushrooms are not as extensively regulated as California peaches, plums, and nectarines. This Court's opinion in *Wileman Brothers*, while preliminarily noting the regulatory context in which that case arose, did not rest its First Amendment analysis on the extent to which the California tree fruit industries were subject to other government regulation. Indeed, the Court explicitly granted certiorari in *Wileman Brothers* to resolve a circuit conflict with a case involving a generic advertising program established under a statute that did not otherwise regulate the particular agricultural commodity involved. *Wileman Brothers* therefore is not appropriately read as turning on whether Congress sought to strengthen a sector of the agricultural economy solely through a generic advertising program or, alternatively, through a generic advertising program combined with other regulations of price, quantity, or quality (only the last of which had actually been imposed, contrary to the court of appeals' assumption, on the California tree fruit industries in *Wileman Brothers*).

Nor is there any First Amendment justification for such a distinction. The government's purpose for adopting a generic advertising program—to stimulate sales of a commodity—is equally valid regardless of the extent (if any) to which the commodity may be subject to other regulation. So, too, the government's choice to fund the program through mandatory assessments on members of the industry, in order to avoid the problem of "free riders" who would obtain the benefits of the program without sharing the costs, is equally valid whether or not those members also suffer the burdens, or enjoy the benefits, of other regulation. None of this Court's First Amendment decisions supports the court

of appeals' "principle of reciprocity" under which members of an industry may be required to finance a generic advertising program only as payment for "commercial benefits," distinct from those provided by the advertising program itself, that the members receive as a result of other government regulation. Pet. App. 7a-8a.

II. There is an additional reason, independent of the Court's decision in *Wileman Brothers*, to sustain the generic advertising program for mushrooms. The First Amendment does not constrain the government's ability to engage in speech of its own, whether the speech is funded from general tax revenues or from targeted exactions on those who benefit most from the speech. The Mushroom Council's promotional activities, carried out pursuant to the Mushroom Act and the Mushroom Order, are properly viewed as government speech. Under the standard articulated by the Court in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 400 (1995), the Mushroom Council is part of the government for First Amendment purposes. The Mushroom Council was established by Congress and the Secretary under a special law, it is designed to serve objectives of the government, and its members are appointed (and may be removed) by the Secretary of Agriculture. Moreover, the Mushroom Act and the Mushroom Order not only specify the sorts of speech in which the Mushroom Council may (and may not) engage, but also require that all plans, projects, and budgets of the Mushroom Council receive the advance approval of the Secretary. Accordingly, because the Mushroom Council, as part of the government, is simply engaging in expression of its own about mushrooms, the First Amendment is not implicated here, under the principle that "[t]he government, as a general rule, may support valid programs and policies by taxes or other exactions

binding on protesting parties" and, in so doing, may engage in "speech and other expression to advocate and defend its own policies." *Board of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 120 S. Ct. 1346, 1354 (2000).

ARGUMENT

I. THE GENERIC ADVERTISING PROGRAM FOR MUSHROOMS DOES NOT VIOLATE THE FIRST AMENDMENT UNDER THIS COURT'S DECISION IN *WILEMAN BROTHERS*

A. For Each Of The Three Reasons Identified By The Court In *Wileman Brothers*, The Generic Advertising Program Here Is Unlike Laws That Have Been Held To Abridge The Freedom Of Speech

1. In *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), this Court rejected a First Amendment challenge to the generic advertising programs for California peaches, plums, and nectarines authorized by the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.* Those generic advertising programs, like the generic advertising program for fresh mushrooms in this case, were funded by mandatory assessments imposed on producers or handlers of the commodities. The Court concluded that the generic advertising programs in *Wileman Brothers* were subject to scrutiny not under the "heightened standard appropriate for the review of First Amendment issues," but instead under the more deferential standard "appropriate for the review of economic regulation." 521 U.S. at 469.

The Court's analysis in *Wileman Brothers* turned on three vital distinctions between generic advertising programs for commercial products and laws that have been found to abridge the freedom of speech protected by the First Amendment: *first*, generic advertising

programs "impose no restraint on the freedom of any producer to communicate any message to any audience"; *second*, generic advertising programs "do not compel any person to engage in any actual or symbolic speech"; and, *third*, generic advertising programs "do not compel the producers to endorse or to finance any political or ideological views." *Wileman Bros.*, 521 U.S. at 469-470; see also *id.* at 470-472. "Indeed," the Court continued, "since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program." *Id.* at 470. Accordingly, the Court concluded that "none of our First Amendment jurisprudence provides any support for the suggestion that the promotional regulations should be scrutinized under a different standard" from that applicable to other economic regulations. *Ibid.*[8]

The Court, in elaborating upon that holding, rejected the contention that the generic advertising programs involved the sort of compelled funding of expressive and associational activity that was held to implicate the First Amendment in cases such as *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977). *Wileman Bros.*, 521 U.S. at 472-473. The Court explained that

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[8] The Court noted, in particular, that its "compelled speech" case law was "clearly inapplicable." *Wileman Bros.*, 521 U.S. at 470. The Court explained that the use of assessments to pay for advertising "does not require respondents to repeat an objectionable message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they would prefer to remain silent, or require them to be publicly identified or associated with another's message." *Id.* at 470-471 (internal citations and quotation marks omitted).

"*Abood*, and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities," but instead "merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'" *Id.* at 471 (quoting *Abood*, 431 U.S. at 235). The Court added that an individual may be required to contribute even to such activities—although they may be to some extent ideological—provided that the activities are "germane" to a sufficiently important legislative purpose justifying the compelled association. *Id.* at 472-473 (discussing *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991), and *Keller* v. *State Bar*, 496 U.S. 1 (1990)).

The Court concluded that the generic advertising programs in *Wileman Brothers* "clearly satisfied" the standard articulated in *Abood* and its progeny on two counts: "(1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, (2) in any event, the assessments are not used to fund ideological activities." *Wileman Bros.*, 521 U.S. at 473.[9] Indeed,

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[9] The Court thus recognized that the compelled funding of expressive activities does not violate the First Amendment so long as at least one of the quoted requirements is satisfied—*i.e.*, that the expressive activities are *either* non-ideological *or* germane to the statutory or regulatory purpose (or, as here and in *Wileman Brothers*, both). That conclusion is reinforced by the Court's use of the phrase "in any event," which is ordinarily used to introduce an independently sufficient ground of decision. Cf. *Flamer* v. *Delaware*, 68 F.3d 736, 757 (3d Cir. 1995) (en banc) ("[A]s the Supreme Court's use of the phrase 'in any event' [in *Victor* v. *Nebraska*, 511 U.S. 1, 20 (1994)] suggests, we do not interpret the Court's opinion

the Court recognized that compelled contributions to generic advertising programs for agricultural commodities are "even less likely to pose a First Amendment burden" than the compelled contributions for collective bargaining activities in *Lehnert* and *Abood*, because "a union agency-shop agreement * * * arguably always poses some burden on First Amendment rights," whereas collective marketing programs for commercial products "do not, as a general matter, impinge on speech or association rights." *Id.* at 473-474 n.16.

2. Here, based on the same three distinctions identified by the Court in *Wileman Brothers*, the generic advertising program for mushrooms is unlike laws that have been held to violate the First Amendment. The Mushroom Act and the Mushroom Order do not restrain the freedom of respondent or other mushroom producers "to communicate any message to any audience," do not compel respondent or other producers "to engage in any actual or symbolic speech," and do not require respondent or other producers "to endorse or to finance any political or ideological views." *Wileman Bros.*, 521 U.S. at 469-470.

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to mean that this alternative definition was essential to its holding."), cert. denied, 516 U.S. 1088 (1996). Justice Souter, in his dissenting opinion in *Wileman Brothers*, understood the Court's opinion as stating alternative bases on which a generic advertising program funded by assessments on members of the industry could satisfy the First Amendment. See 521 U.S. at 483 n.3 (Souter, J., dissenting) (describing the Court's opinion as holding "that a compelled subsidy of speech does not implicate the First Amendment if the speech either is germane to an otherwise permissible regulatory scheme or is nonideological, so that each of these characteristics constitutes an independent, sufficient criterion for upholding the subsidy").

Instead, the Mushroom Act and the Mushroom Order merely require respondent and other producers to share in the costs of commercial messages, without any political or ideological content, that are germane to the statutory purposes of "strengthen[ing] the mushroom industry's position in the marketplace," "maintain[ing] and expand[ing] existing markets and uses for mushrooms," and "develop[ing] new markets and uses for mushrooms." 7 U.S.C. 6101(b). The Act explicitly "prohibit[s]" the use of producers' and importers' assessments "in any manner for the purpose of influencing legislation or government action or policy." 7 U.S.C. 6104(h).[10] The Act also explicitly confines the use of those assessments to the "payment of the expenses in implementing and administering this chapter," 7 U.S.C. 6104(g)(3)--expenses relating to developing and carrying out programs of "mushroom promotion, research, consumer information, and industry information," which must be proposed by the Mushroom Council and approved by the Secretary before they are put into effect, 7 U.S.C. 6104(c)(4). See also 7 C.F.R. 1209.40 (describing the "programs, plans, and projects" that may be conducted under the Mushroom Act and the Mushroom Order).

Thus, the generic advertising program for mushrooms, like those for California tree fruits in *Wileman*

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[10] The Mushroom Act excepts from that prohibition the use of funds received by the Mushroom Council for the development and recommendation to the Secretary of amendments to the Mushroom Order and for submission to the Secretary of recommended voluntary grade and quality standards for mushrooms. 7 U.S.C. 6104(h); see also 7 U.S.C. 6104(c)(5) (providing that the Mushroom Order may authorize the Mushroom Council to develop such standards). We have been informed by the Department of Agriculture that no voluntary grade or quality standards have been developed to date.

Brothers, is "a species of economic regulation that should enjoy the same strong presumption of validity that [the Court] accord[s] to other policy judgments made by Congress." 521 U.S. at 477. The Court has recognized that such programs serve a "legitimate" governmental purpose—that is, "stimulat[ing] consumer demand for an agricultural product." *Id.* at 476.[11] Congress, the Secretary, and the industry itself have all determined that the program established under the Mushroom Act and the Mushroom Order is "effective," *ibid.*, to serve that purpose. In such circumstances, as in *Wileman Brothers*, "[t]he mere fact that one or more producers 'do not wish to foster' generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial." *Id.* at 477.

There is, if anything, even more reason here than in *Wileman Brothers* for the Court to "assume," without any need to engage in further inquiry, that the generic advertising program "accomplish[es] [its] goals" and "therefore further[s] the interests of those who pay for [it]." *Wileman Bros.*, 521 U.S. at 462-463 n.3. In contrast to the generic advertising programs for California tree fruits, which were adopted by the Secretary under

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[11] In *Wileman Brothers*, the Court identified the government's interest as stimulating demand for agricultural products "in a regulated market." 521 U.S. at 476. As we explain below (at 24-26), regardless of the extent to which the market for a commodity is regulated, the government's interest in maintaining and expanding that market is equally legitimate. Moreover, the Court recognized that a generic advertising program funded with mandatory contributions from members of the industry is itself "regulatory." See *id.* at 476 (referring to "promotional advertising" and "other regulatory programs").

the general authority of the AMAA, the generic advertising program for mushrooms was specifically authorized by Congress in 1990. At that time, Congress expressly found the mushroom program to be "in the public interest," 7 U.S.C. 6101(b), as "necessary to maintain and expand existing markets for mushrooms," 7 U.S.C. 6101(a)(6).[12] In 1996, Congress reaffirmed in the FAIR Act that the generic advertising program for mushrooms, along with a number of other specifically identified programs, "is in the national public interest and vital to the welfare of the agricultural economy of the United States." 7 U.S.C. 7401(b)(1); see 7 U.S.C. 7401(a)(10) (identifying the mushroom program as one of the programs addressed by the FAIR Act). And, as recently as 1998, in a statutorily required referendum of producers and importers subject to assessments under the Mushroom Act, 80% of those voting agreed that the generic advertising program should be continued. See note 6, *supra*; cf. *Wileman Bros.*, 521 U.S. at 463 (noting that marketing order amendments providing for generic advertising programs were adopted between 1966 and 1976). There is no warrant under *Wileman Brothers* for courts to revisit such recent, specific, and decisive "policy judgments" by Congress, the Secretary, and the affected industry. 521 U.S. at 476.

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[12] The legislative record reflects that Members of Congress were aware both of the widespread support within the mushroom industry for a generic advertising program and of respondent's opposition to such a program. See note 5, *supra*.

B. The Court Of Appeals Erred In Distinguishing This Case From *Wileman Brothers* On The Ground That Mushrooms Are Not As Extensively Regulated As California Tree Fruits

The court of appeals departed from the holding in *Wileman Brothers* on the ground that, in its view, the mushroom industry is "unregulated," whereas the California peach, plum, and nectarine industries are "fully collectivized" and "no longer a part of a free market." Pet. App. 7a-8a. The court of appeals' analysis is not supported by *Wileman Brothers*, by this Court's other decisions involving compelled funding of expression, or otherwise by fact, law, or logic. And it is premised on a misunderstanding of the scope of the marketing orders in *Wileman Brothers*, which did not, as the court below supposed (*id.* at 7a-8a), extend to "price" and "supply" regulations that conferred the benefits of "monopoly power" on the California tree fruit industries.

1. The court of appeals distinguished the generic advertising program for mushrooms from the generic advertising programs for California tree fruits on the basis of language that was not a part of this Court's First Amendment analysis in Part IV of the *Wileman Brothers* opinion. Instead, the discussion of industry regulation relied upon by the court of appeals was set forth in Part III of the *Wileman Brothers* opinion, the section in which the Court sought to define the scope of the controversy before it. There, the Court explained that, in answering the question "whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy," "we stress the importance

of the statutory context in which it arises." *Wileman Bros.*, 521 U.S. at 468-469. The Court went on to state:

> California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.

Id. at 469.

That discussion is not repeated, referenced, or relied upon in Part IV of the *Wileman Brothers* opinion, the section that contains the Court's core First Amendment analysis. Compare 521 U.S. at 467-469 (Pt. III) with *id.* at 469-474 (Pt. IV). And significantly, none of the three grounds on which the Court distinguished the laws in *Wileman Brothers* from laws held to violate the First Amendment has anything to do with the extent to which the industry subject to the law is otherwise regulated. See *id.* at 469-470; see pp. 14-15, *supra*. Presumably, if the Court had intended its decision in *Wileman Brothers* to turn on the extent of regulation of the industry at issue, the Court would not merely have stated as a fact that the California peach, plum, and nectarine industries were regulated in other respects, but would also have explained the significance of that fact to its First Amendment holding.

As one court has suggested, "the point" of the Court's discussion of the regulatory context in *Wileman Brothers* appears to be that "the advertising tool

merely seeks to accomplish the same goals as equally or more invasive tools, such as price, quantity, quality and labeling restrictions," which indisputably are entitled to a strong presumption of validity. *Gerawan Farming, Inc.* v. *Veneman*, 85 Cal. Rptr. 2d 598, 605 (Ct. App. 1999), aff'd in part and vacated in part *sub nom. Gerawan Farming, Inc.* v. *Lyons*, 12 P.3d 720 (Cal. 2000) (remanding for consideration of objecting growers' challenge under free speech provision of California Constitution). It thus seems particularly appropriate to accord the same degree of judicial scrutiny to all of the regulatory tools that are directed at those goals, notwithstanding that "the advertising tool involves an activity that, in other contexts, is 'commercial speech' protected by the First Amendment." 85 Cal. Rptr. at 605. That analysis is consistent with the Court's observation in *Wileman Brothers* that "decisions that are made by the majority, if acceptable for other regulatory programs, should be equally so for promotional advertising." 521 U.S. at 476.

Moreover, the Court granted certiorari in *Wileman Brothers* to resolve a conflict between the Ninth Circuit's decision in that case and the Third Circuit's decision in *United States* v. *Frame*, 885 F.2d 1119 (1989), cert. denied, 493 U.S. 1094 (1990). See *Wileman Bros.*, 521 U.S. at 466-467. *Frame*, like the present case, involved a First Amendment challenge to a generic advertising program established pursuant to a statute —there, the Beef Promotion and Research Act of 1985, 7 U.S.C. 2901 *et seq.* (Beef Act)—that does not extensively regulate the relevant industry. The Beef Act, like the Mushroom Act, is concerned solely with "promotion and advertising, research, consumer information, and industry information" funded through assessments on producers and importers. 7 U.S.C. 2904(4)(B);

see *Frame*, 885 F.2d at 1122 (The Beef Act "was structured as a 'self-help' measure that would enable the beef industry to employ its own resources and devise its own strategies to increase beef sales, while simultaneously avoiding the intrusiveness of government regulation and the cost of government 'handouts.'"). The Court was made aware of the differences in regulatory scope between the orders in *Wileman Brothers* and *Frame*. See Oral Argument Tr. at 26, *Wileman Bros.* (No. 95-1184) (government counsel explains that "[t]he beef program focuses almost exclusively on promotional programs and advertising"); *Frame*, 885 F.2d at 1122-1124; see also *Wileman Bros.*, 521 U.S. at 466-467 (discussing *Frame*). The Court did not suggest that a distinction of constitutional significance should be drawn between the advertising program in *Frame* and the advertising programs in *Wileman Brothers*. If the Court's decision in *Wileman Brothers* were limited to generic advertising programs imposed under marketing orders comprehensively regulating a commodity, then the Court's decision would not support the decision in *Frame*, and the Court presumably would have said so, having granted certiorari to resolve the conflict between *Wileman Brothers* and *Frame*.

2. In any event, whether or not *Wileman Brothers* squarely controls a case involving "stand alone" generic advertising programs such as the ones here and in *Frame*, the Court's First Amendment rationale in *Wileman Brothers* plainly does apply, as we have explained above. Accordingly, the Court now should hold that such programs are consistent with the First Amendment. There is no reason to evaluate generic advertising programs differently under the First Amendment depending upon whether, or to what extent, the pro-

gram involves a commodity that is subject to other sorts of government regulation in addition to assessments for generic advertising.

The *purpose* of a generic advertising program is the same, whether the program stands alone (as here) or is part of a more comprehensive regulatory scheme (as in *Wileman Brothers*). In either case, the purpose is to maintain and expand the market for an agricultural commodity, to the benefit of the producers and processors of the commodity and, ultimately, of the Nation's agricultural economy as a whole. See *Wileman Bros.*, 521 U.S. at 476 (noting that the government's purpose of "stimulat[ing] consumer demand for an agricultural product in a regulated market" is a "legitimate" one); 7 U.S.C. 7401(a), (b)(1) and (2) (congressional findings in the FAIR Act with respect to generic advertising programs).[13] That purpose is equally legitimate whether the government has sought to achieve it through a generic advertising program alone or, alternatively, though a generic advertising program coupled with regulations of, for example, quality, quantity, or price. It would make little sense to require Congress, in order to assure the constitutionality of a generic advertising program designed to stimulate the market for a given commodity, to tack on

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[13] Congress made that point clearly in the FAIR Act, which articulated the same "national public interest" served by all extant generic advertising programs for agricultural commodities, including programs authorized under the AMAA (like those in *Wileman Brothers*) as well as programs authorized under specific statutes such as the Mushroom Act. 7 U.S.C. 7401(b)(1); see 7 U.S.C. 7401(a)(1)(referring generally to AMAA programs) and (10) (referring specifically to Mushroom Act).

other regulations that Congress did not consider necessary to achieve that purpose.[14]

So, too, the *effect* of the generic advertising program is the same, whether the program stands alone or is part of a more comprehensive regulatory scheme. In either case, the program is financed by assessments on all producers or handlers of the commodity, so as to avoid the problem of "free riders" who could obtain the benefits of the program without sharing the costs. Those means are equally legitimate whether the assessments are used only to fund a generic advertising program or also to fund other regulatory efforts, such as an inspection program. Cf. *Abood*, 431 U.S. at 224 (declining to apply a more rigorous First Amendment analysis when an agency-shop requirement is imposed on government employees as opposed to private sector employees, because "[t]he desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller").[15]

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[14] In some settings, Congress might find such additional regulation not only unnecessary, but also unwise. For example, as noted by congressional supporters of the generic advertising programs enacted in 1990 for mushrooms and other agricultural commodities, some regulatory measures designed to strengthen the position of domestic producers and processors of a commodity could antagonize our foreign trading partners. See 136 Cong. Rec. at 19,614 (statement of Sen. Heinz). And regulations that operate directly to restrict the supply or maintain the price of a commodity may antagonize consumers.

[15] This Court's decisions involving compelled funding of expressive or associational activities (*e.g.*, *Abood*, *Lehnert*, and *Keller*) do not suggest a First Amendment distinction based on whether, or to what extent, the government otherwise regulates the party on whom the funding obligation is imposed. To the contrary, the Court has applied the same standard to public employees, whose workplaces perforce are comprehensively regulated by the govern-

3. The court of appeals, in seeking to distinguish this case from *Wileman Brothers*, assumed that members of "fully collectivized" industries—a category in which the court included the California peach, plum, and nectarine industries—enjoy the benefits of "the monopoly powers inherent in government control of price and supply." Pet. App. 7a-8a. The court reasoned that only "[i]n exchange for" such benefits may industry members be required to contribute to a generic advertising program. *Id.* at 8a. The court held that such contributions may not be exacted, however, in industries without such extensive regulation. *Ibid.* The court of appeals erred in several basic respects.

As an initial matter, the court of appeals' analysis rests on two erroneous factual premises. The California tree fruit handlers in *Wileman Brothers* did not operate under a regulatory regime whereby, as the court of appeals assumed (Pet. App. 7a), they possessed "monopoly power resulting from regulation of price and supply." Instead, the marketing orders in that case authorized collective advertising and "govern[ed] marketing matters such as fruit size and maturity levels." *Wileman Bros.*, 521 U.S. at 462; see also *Gerawan Farming*, 12 P.3d at 746 (noting that the marketing orders in *Wileman Brothers* "provided for the undertaking * * * of research and development projects, including advertising, and set out specific regulations regarding both fruit containers and packs and also fruit grades and sizes"). Those marketing orders did not

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ment, and to private sector employees, whose workplaces ordinarily are less extensively regulated. See *Abood*, 431 U.S. at 229-230 (rejecting argument that more rigorous First Amendment standard should apply to public employees); see also *Keller*, 496 U.S. at 10 (observing that *Abood* principles apply "equally to employees in the private sector").

impose limits on the supply or price of the covered commodities. See 7 C.F.R. Pts. 916, 917 (1997).[16] The additional regulations that the marketing orders *did* impose, such as fruit size and maturity standards, were doubtless perceived as beneficial by the affected industries. (For example, if California peaches are marketed at their optimal size and ripeness, consumers might be expected to buy more of them.) But those sorts of regulations ordinarily would not, standing alone, enable an industry to enjoy the benefits associated with "monopoly power." Nor did the court of appeals in this case, which mistakenly perceived the marketing orders in *Wileman Brothers* as regulating much more extensively, suggest that mere size, maturity, or packaging regulations would have that effect.

Also contrary to the court of appeals' premise (Pet. App. 8a), the mushroom industry is not wholly "unregulated." As the Court indicated in *Wileman Brothers*, a generic advertising program funded with mandatory contributions from members of the industry is itself "regulatory." See 521 U.S. at 476 (referring to "promotional advertising" and "other regulatory programs"). Moreover, as with respect to the California tree fruit

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[16] This Court appears to have recognized as much. See *Wileman Bros.*, 521 U.S. at 461-462 (distinguishing the regulations actually imposed by the marketing orders at issue from the broader set of "collective activities that Congress authorized" in the AMAA); *id.* at 461 (noting that marketing orders under the AMAA "*may* include mechanisms that provide a uniform price to all producers") (emphasis added). The mere fact that price or supply regulations *could* have been imposed on the California tree fruit industries in *Wileman Brothers* provides no basis to distinguish that case from this one, because such regulations could also be adopted for the mushroom industry under the AMAA. See pp. 28-29, *infra*.

industries in *Wileman Brothers*, the statutory framework exists under the AMAA, as well as under the Mushroom Act, for additional regulation of the mushroom industry. The AMAA authorizes the same degree of regulation by industry consensus in the mushroom industry as in the California tree fruit industries. See 7 U.S.C. 608c(2) (with exceptions not relevant here, "any agricultural commodity" may be covered by an "[o]rder[] issued pursuant to" the AMAA). And the Mushroom Act authorizes the Mushroom Council to develop voluntary grade and quality standards, which would serve essentially the same purposes as the binding fruit size and maturity standards under the marketing orders in *Wileman Brothers*. See 7 U.S.C. 6104(c)(5).

In any event, this Court's compelled funding cases, including *Wileman Brothers*, offer no support for the so-called "reciprocity principle" announced by the court of appeals—*i.e.*, that a person may be compelled to fund expressive activity only "[i]n exchange for" some benefit (*e.g.*, "monopoly power") that is distinct from, and in addition to, the benefit that the person receives from the expressive activity itself (*e.g.*, increased consumer awareness of mushrooms). Pet. App. 8a. This Court has not suggested that, as the court of appeals held (*id.* at 7a-8a), assessments to fund "nonideological * * * commercial speech" are justified only "in the context of the extensive regulation of an industry but not otherwise," on the premise that only in the former context will such assessments serve "to deter free riders who take advantage of their monopoly power resulting from regulation of price and supply

without paying for whatever commercial benefits such free riders receive at the hands of the government."[17]

Rather, this Court's cases proceed on the understanding that, when the legislature determines that a sufficiently important public purpose will be served by collective speech or association among members of a group (*e.g.*, fruit growers, public school teachers, lawyers), the legislature may require all members of the group to share the costs of that collective speech or association so as to avoid "free rider" problems. See, *e.g.*, *Keller*, 496 U.S. at 12; *Abood*, 431 U.S. at 221-222. In considering whether the assessments imposed on objecting members of the group comport with the First Amendment, the Court has looked to whether the assessments are used to fund activities that are either non-ideological or germane to the public purpose that justified the collective speech or association. See, *e.g.*, *Keller*, 496 U.S. at 13-14; *Abood*, 431 U.S. at 222-223, 236. But the Court has not also looked to whether the members obtain some additional economic (or other) benefit, under regulatory provisions separate from

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[17] Indeed, this Court has recognized that businesses with "monopoly power" enjoy First Amendment protection, just as do businesses without such power. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 568 (1980) (concluding that a utility's "monopoly position does not alter the First Amendment's protection for its commercial speech"); *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 534 n.1 (1980) ("We have recognized that the speech of heavily regulated businesses may enjoy constitutional protection."). Although those cases arose in the context of government regulations that (unlike those here and in *Wileman Brothers*) suppressed the companies' own speech, they reinforce the conclusion that the distinction drawn by the court of appeals is also without constitutional significance with respect to mandatory assessments to fund generic advertising programs.

those establishing a program of collective speech or association, "in exchange for" which the members may be required to contribute to that program.

Finally, the court of appeals' approach, if allowed to stand, would produce difficulties in application and anomalies in result. It would require a court to engage in an intricate analysis of all of the regulatory provisions applicable to a given commodity, so as to ascertain whether those provisions confer some other commercial benefit on producers of the commodity, in return for which they may be required to participate in a generic advertising program. Presumably, a court could not look solely at the statute or marketing order establishing the generic advertising program, because a commodity may be regulated (or subject to regulation) in other respects under other statutes or marketing orders. For example, the generic advertising programs for milk, dairy products, and beef are each established pursuant to statutes that, like the Mushroom Act, do not otherwise regulate the commodity at issue. See 7 U.S.C. 2901 *et seq.* (beef); 7 U.S.C. 4501 *et seq.* (dairy products); 7 U.S.C. 6401 *et seq.* (fluid milk). But those commodities are regulated extensively (in some respects more extensively than the California tree fruits in *Wileman Brothers*) under other federal and state statues.[18] Thus, of two generic advertising programs authorized by Congress and established by the Secretary pursuant to statutes virtually identical to the

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[18] The Sixth Circuit, in an unpublished opinion that was issued shortly before its decision in this case, sustained the generic advertising program for dairy products against a First Amendment challenge. *Nature's Dairy* v. *Glickman*, No. 98-1073, 1999 WL 137631 (Mar. 2, 1999) (173 F.3d 429 (Table)), cert. denied, 528 U.S. 1074 (2000).

Mushroom Act, one program might be constitutional and the other unconstitutional under the court of appeals' approach, depending on whether another Congress, another Secretary, or another federal or state authority had imposed additional regulations on the commodity to be advertised.

II. THE GENERIC ADVERTISING PROGRAM FOR MUSHROOMS DOES NOT VIOLATE THE FIRST AMENDMENT FOR THE INDEPENDENT REASON THAT IT INVOLVES ONLY GOVERNMENT SPEECH

There is a second reason, independent of this Court's decision in *Wileman Brothers*, why the generic advertising program for mushrooms is consistent with the First Amendment. The First Amendment does not constrain the government's ability to engage in speech of its own, whether funded by general tax revenues or by "user fees" imposed on those who benefit most from the speech. The Mushroom Act and the Mushroom Order may appropriately be viewed as establishing a program of government speech.[19]

1. This Court has recognized that "[t]he government, as a general rule, may support valid programs and policies by taxes or other exactions binding on

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[19] The argument that the generic advertising program for mushrooms is permissible government speech, although not raised or addressed below, "is fairly embraced within the question set forth in the petition for certiorari," *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379-380 (1995), which asks whether the generic advertising program for mushrooms violates the First Amendment. See Pet. I. The government did not rely upon an argument based on the "government speech" doctrine in *Wileman Brothers*. See 521 U.S. at 482 n.2 (Souter, J., dissenting); U.S. Br. at 25 n.16, *Wileman Bros.*, No. 95-1184.

protesting parties." *Board of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 120 S. Ct. 1346, 1354 (2000). It follows from that "broader principle" that the government may spend the funds that it raises to engage in "speech and other expression to advocate and defend its own policies." *Ibid.*; see also, *e.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes").

The government's speech necessarily is paid for by citizens, some of whom (although, presumably, a minority) may disagree with its message. But such disagreement provides no basis under the First Amendment to silence the government or to excuse objecting citizens from having to share the costs of its speech. The First Amendment limits government interference with private speech; it does not limit the government's own speech. See *Keller*, 496 U.S. at 12-13 ("If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed."); *Lathrop* v. *Donohue*, 367 U.S. 820, 857 (1961) (Harlan, J., concurring) ("A federal taxpayer obtains no refund if he is offended by what is put out by the United States Information Agency."). As Justice Scalia has put it:

> It is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects * * *. And it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether [government] officials further their (and, in a democracy, our)

> favored point of view by achieving it directly * * *; or by advocating it officially * * *; or by giving money to others who achieve or advocate it * * *. None of this has anything to do with abridging anyone's speech.

National Endowment for the Arts v. *Finley*, 524 U.S. 569, 598 (1999) (Scalia, J., concurring); see also *Block* v. *Meese*, 793 F.2d 1303, 1313 (D.C. Cir.) (Scalia, J.) (rejecting the view that the marketplace of ideas is "one in which the government's wares cannot be advertised"), cert. denied, 478 U.S. 1021 (1986).[20]

2. The speech engaged in by the Mushroom Council, subject to the continuing oversight of the Secretary of Agriculture, is government speech for purposes of the First Amendment.

In *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1985), the Court held that Amtrak is an arm of the government, such that Amtrak is subject to the constraints of the First Amendment when it restricts private speech. The Court ruled that, when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id.* at 400.

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[20] Similarly, Justice Powell, in his concurring opinion in *Abood*, recognized that "[c]ompelled support of a private association is fundamentally different from compelled support of government." 431 U.S. at 259 n.13 (Powell, J., concurring). As Justice Powell explained, "the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people." *Ibid.*

Under that standard, the Mushroom Council, even more clearly than Amtrak, is part of the government for First Amendment purposes. First, the Mushroom Council, like Amtrak, was "create[d] * * * by special law." *Lebron*, 513 U.S. at 400. As explained above (at 3 & note 1), the Mushroom Act specifically provides for the establishment of the Mushroom Council, by an order issued by the Secretary of Agriculture, subject to approval of that order by a majority of mushroom producers and importers. 7 U.S.C. 6103, 6104(b), 6105(a); see *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 577-578 (1939); *Currin* v. *Wallace*, 306 U.S. 1, 15-16 (1939).

Second, the Mushroom Council, like Amtrak, was established "for the furtherance of governmental objectives." *Lebron*, 513 U.S. at 400. As explained above (at 3-4), the Mushroom Council was designed to propose to the Secretary and to implement programs of "mushroom promotion, research, consumer information, and industry information." 7 U.S.C. 6104(c)(4). The Mushroom Act declares it to be the "policy of Congress" that it is in "the public interest" to authorize a mechanism for developing, financing (through assessments), and carrying out an effective program of promotion, research, and consumer and industry information designed to "strengthen the mushroom industry's position in the marketplace," "maintain and expand existing markets and uses for mushrooms," and "develop new markets and uses for mushrooms." 7 U.S.C. 6101(b); see also 7 U.S.C. 7401(b)(1) (discussing the "national public interest" served by generic advertising pro-

grams, including the mushroom program, see 7 U.S.C. 7401(a)(10)).[21]

Third, the Secretary appoints not merely "a majority," *Lebron*, 513 U.S. at 400, of the members of the Mushroom Council, but *all* of its members. 7 U.S.C. 6104(b)(1)(B) ("the members of the Council shall be mushroom producers and importers *appointed by the Secretary* from nominations submitted by producers and importers in the manner authorized by the Secretary") (emphasis added); see also 7 U.S.C. 6104(b)(2)(G) (Secretary may appoint members of the Council in the absence of nominations from producers and importers). The Mushroom Act establishes three-year terms of appointment, 7 U.S.C. 6104(b)(3)(A), thereby assuring the Secretary's continuing role in the composition of the

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[21] In the FAIR Act, Congress referred to generic promotional programs as "'self-help' mechanisms." 7 U.S.C. 7401(b)(8). As the rest of that provision of the FAIR Act makes clear, the reference to such programs as "'self-help' mechanisms" simply reflects the fact that such programs provide "for producers and processors to fund generic promotions for covered commodities," *ibid.*—and, presumably, that members of the industry involved typically participate in a referendum before the order establishing a promotional program becomes effective and nominate persons for the Secretary to appoint to a council or board established by the order. That description does not detract from the status of the advertising generated by such programs as government speech for First Amendment purposes. To the contrary, 7 U.S.C. 7401(b)(8) goes on to state that the generic promotion programs are conducted "under the required supervision and oversight of the Secretary of Agriculture," "further specific national governmental goals, as established by Congress," and "produce nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding the markets for the covered commodities."

Council.[22] The Secretary also has authority to remove members of the Council for "adequate cause." 7 C.F.R. 1209.35(c).

The statutory and regulatory scheme governing the Mushroom Council, in addition to satisfying the three factors articulated in *Lebron*, provides further reason to conclude the Council's speech may properly be viewed as government speech. Most significantly, of course, the central thrust of the expression to be undertaken by the Council—the promotion of mushrooms—is prescribed by the Mushroom Act, see 7 U.S.C. 6101(a)(5) and (b); 7 U.S.C. 6104(c)(4), and the Mushroom Order, see 7 C.F.R. 1209.40(a)(1). Cf. *Wileman Bros.*, 521 U.S. at 470 (referring to the "central message" of the speech generated by the generic advertising program). The Act and the Order also carefully delineate in other respects the activities, including the expressive activities, in which the Council may, and may not, engage. See 7 U.S.C. 6104(c) (defining the "powers and duties" of the Council); 7 C.F.R. 1209.38-1209.39 (same); see also 7 U.S.C. 6104(h) (prohibiting the Council from using its funds "in any manner for the purpose of influencing legislation or governmental action or policy"); 7 C.F.R. 1209.40(d) (prohibiting the Council from, *inter alia*, making any reference in its programs "to a brand name, trade name, or State or regional identification of any mushrooms or mushroom product"). The Act and the Order also provide for the Secretary's continuing oversight of the Council's activities. For example, the Act directs that "[n]o plan or project of promotion, research, consumer information, or industry information, or budget, shall be implemented prior to its

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[22] A member is limited to serving two three-year terms. 7 C.F.R. 1209.34(e)(1).

approval by the Secretary." 7 U.S.C. 6104(d)(3); see also 7 C.F.R. 1209.70 ("All fiscal matters, programs, plans, or projects, rules or regulations, reports, or other substantive actions proposed and prepared by the Council shall be submitted to the Secretary for approval.").[23] The Secretary also has the authority to suspend or terminate the mushroom program at any time upon determining that the program "obstructs or does not tend to effectuate the declared policy of this chapter." 7 U.S.C. 6110.[24]

In addition, any legal proceedings concerning the enforcement or validity of any order issued under the Mushroom Act are brought by or against the United States. Thus, the Mushroom Act provides that any

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[23] The Secretary's currently applicable Guidelines for the oversight of generic advertising programs, such as the mushroom program, provide for review, *inter alia*, of "all commodity promotional campaigns—advertising, consumer education programs, and other promotional materials" as well as "the advertisements or printed materials generated in the campaign." Agricultural Mktg. Serv., United States Dep't of Agric., *Guidelines for AMS Oversight of Commodity Research and Promotion Programs* 7 (1994). The Guidelines explicitly require the disapproval of advertising that the Agricultural Marketing Service considers to be "false and misleading" or "disparaging to another commodity." *Id.* at 8; see also Agricultural Mktg. Serv., United States Dep't of Agric., *Guidelines for AMS Oversight of Commodity Research and Promotion Programs*, 64 Fed. Reg. 70,682 (1999) (proposing revised Guidelines).

[24] The status of the Mushroom Council as a government entity is further demonstrated by the provision of the Mushroom Order governing the ownership of property created through projects administered by the Council: "Any patents, copyrights, inventions, publications, or product formulations developed through the use of funds received by the Council under this subpart shall be the property of *the United States Government as represented by the Council*." 7 C.F.R. 1209.75 (emphasis added).

person who is subject to an order issued under the Act may file a petition with the Secretary, contending that the order, a provision of the order, or any obligation imposed in connection with the order is contrary to law, or requesting a modification of or exemption from the order. See 7 U.S.C. 6106(a). The Secretary's final decision on the petition, after a hearing, is subject to judicial review in district court. See 7 U.S.C. 6106(a)(2) and (b). Respondent invoked that procedure in this case. See Pet. App. 11a. Similarly, an enforcement action may be brought against any person who violates any order or regulation issued by the Secretary under the Mushroom Act, either in a civil action brought in district court by the Attorney General on behalf of the United States (see 7 U.S.C. 6107(a) and (b)), as in this case (see Pet. App. 10a-11a), or in administrative proceedings instituted by the Secretary to assess a civil penalty or to issue a cease-and-desist order (see 7 U.S.C. 6107(c)), subject to judicial review and enforcement in district court (see 7 U.S.C. 6107(d)-(f)).

Finally, the FAIR Act, enacted six years after the Mushroom Act, confirms that various generic advertising programs for agricultural commodities, specifically including the mushroom program, see 7 U.S.C. 7401(a)(10), are conducted "under the required supervision and oversight of the Secretary of Agriculture." 7 U.S.C. 7401(b)(8); see also 7 U.S.C. 7401(b)(1) (describing such programs as "Government-supervised"); 7 U.S.C. 7401(b)(2) (describing such programs as "supervised by the Secretary of Agriculture"). The FAIR Act also recognizes the ongoing role of both the Secretary and Congress in assessing whether "the objectives of the programs are being met." 7 U.S.C. 7401(b)(11).

Thus, given that Congress created the Mushroom Council "by special law, for the furtherance of governmental objectives," *Lebron*, 513 U.S. at 400, that the Secretary appoints (and may remove) all members of the Council, that the Mushroom Act and the Mushroom Order specify the central message of any generic advertising and provide substantial direction for the activities of the Council, that the Secretary retains supervisory authority over the Council, and that the authority to enforce the Order is vested in the government, the Council is part of the government, and its speech is government speech, for purposes of the First Amendment.[25] As such, the Council may engage in speech promoting mushrooms, using funds exacted from members of the public, without implicating the First Amendment. Cf. *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring) ("Compelled support of a private association is fundamentally different from compelled support of government.").

3. In *Southworth*, the Court suggested that, in cases where the speech at issue is the government's own, the only question that may remain is "whether traditional political controls [exist] to ensure responsible government action." *Southworth*, 120 S. Ct. at 1354. Such "traditional political controls" clearly exist with respect

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[25] By contrast, in *Keller*, in which the Court held that ideological speech by the California State Bar was not government speech, the State Bar had an existence and functions that were in many ways independent of the State; a majority of its Board of Governors was selected by the membership, not appointed by the State; and the central message of the challenged speech was not prescribed by the government. See 496 U.S. at 4-5 & n.2; *Keller* v. *State Bar*, 767 P.2d 1019, 1023-1025 (Cal. 1989), rev'd, 496 U.S. 1 (1990).

to the advertising and other activities conducted under the Mushroom Act.

Congress, in the Mushroom Act, explicitly approved a program of expressive activity to promote mushrooms; at the same time, Congress imposed its own restrictions on that expressive activity (*e.g.*, prohibiting activity "for the purpose of influencing legislation or governmental action or policy," 7 U.S.C. 6104(h)). Congress also made all "plan[s]" and "project[s]" of mushroom "promotion, research, consumer information, or industry information," as well as all budgets for the Mushroom Council, subject to the approval of the Secretary of Agriculture, a Cabinet officer appointed by the President and confirmed by the Senate. 7 U.S.C. 6104(d)(3); see 7 U.S.C. 2202.[26]

Moreover, Congress built additional political controls into the Mushroom Act in order to assure that the mushroom promotion program serves the interests of those who are required to fund it. Congress thus provided that the program would become effective only if approved by a majority vote in a referendum of those producers and importers who are subject to assessments. 7 U.S.C. 6105(a). Congress provided for a

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[26] The legislative record of the Food, Agriculture, Conservation, and Trade Act of 1990, of which the Mushroom Act was a part, reflects that a number of Members of Congress gave voice to the conclusion that generic advertising programs for agricultural commodities are in the public interest. See, *e.g.*, 136 Cong. Rec. at 19,511-19,513 (statements of Sens. Fowler, Graham, DeConcini, McCain, Bond, Cochran, and Specter); *id.* at 19,614 (statements of Sens. Heinz and Thurmond); *id.* at 19,258 (statement of Rep. Panetta). The statements of Senator Specter (*id.* at 19,513) and Senator Heinz (*id.* at 19,614) reflect that the Mushroom Act was enacted only after receiving the views of members of the mushroom industry, including respondent.

second such referendum after the program had been in effect for five years. 7 U.S.C. 6105(b)(1)(A). And the Act authorizes additional referenda if requested by 30% of affected producers and importers. 7 U.S.C. 6105(b)(1)(B).[27] Accordingly, whatever "traditional political controls" may be required "to ensure responsible government action," *Southworth*, 120 S. Ct. at 1354, they are plainly present in the mushroom program.

4. No more rigorous First Amendment scrutiny of government speech is required here simply because Congress chose to fund the generic advertising not from general tax revenues, but from assessments on those whom Congress determined would "most directly reap the benefits of" the advertising. 7 U.S.C. 7401(b)(2) (making findings with respect to generic advertising programs, including the mushroom program, see 7 U.S.C. 7401(a)(10)). The assessments are a species of "user fees," which this Court has viewed as a permissible means of funding many government activities, including activities relating to expression.[28]

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[27] Such provisions provide meaningful relief where (as is not suggested to be the case here) a generic advertising program loses the support of a majority of producers. See, *e.g.*, *Wileman Bros.*, 521 U.S. at 463 n.5 (noting that the plum portion of one of the marketing orders at issue in that case "was terminated in 1991 after a majority of plum producers failed to vote for its continuation"); see also William Claiborne, *Hog Producers Defeat "Pork Checkoff,"* Wash. Post, Jan. 16, 2001, at A2 (noting that the generic advertising program for pork was to be discontinued by the Secretary of Agriculture after a referendum in which a majority of pork producers voted against the program).

[28] See, *e.g.*, *United States* v. *Sperry Corp.*, 493 U.S. 52, 60-62 (1989) (upholding, as a permissible "user fee," a requirement that successful claimants before the Iran-United States Claims Tribunal pay a portion of any award to the U.S. Treasury as "reimbursement to the United States Government for expenses incurred in

The Court has not suggested that the "government speech" doctrine applies only to speech funded with general tax revenues. To the contrary, in *Southworth*, which concerned the constitutionality of a student activity fee that was used in part to fund student organizations engaging in political or ideological speech, the Court noted that, because "[t]he University ha[d] disclaimed that the speech is its own," the case did not present the question whether the challenged program could be sustained "under the principle that the government can speak for itself." 120 S. Ct. at 1354. The Court went on to observe that, "[i]f the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker." *Ibid.* Thus, the Court recognized the potential applicability of the government speech doctrine to speech funded not from general tax revenues, but from "tuition dollars," another species of user fees. See *ibid.* (observing that "[t]he government, as a general rule, may support valid programs and policies by taxes *or other exactions*

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connection" with the Tribunal); *Kadrmas* v. *Dickinson Pub. Schs.*, 487 U.S. 450, 461-462 (1988) (observing that "[i]t is manifestly rational" for a State "to allow local school boards the option of charging patrons a user fee for bus service" rather than funding such service out of general revenues); *Cox* v. *New Hampshire*, 312 U.S. 569, 576-577 (1941) (State may require payment of a "reasonable" parade license fee to compensate local government for its administrative and law-enforcement expenses); cf. *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 141 (1981) (White, J., concurring) ("No one questions * * * that the Government, the operator of the [postal] system, may impose a fee on those who would use the system, even though the user fee measurably reduces the ability of various persons or organizations to communicate with others.").

binding on protesting parties") (emphasis added); *Rosenberger*, 515 U.S. at 833 (recognizing that "[w]hen the University determines the content of the education it provides, it is the University speaking," without suggesting that the particular source of the University's funds is of any consequence).[29]

The Court need not decide in this case whether the government speech doctrine should ever apply differently depending on whether the speech is funded from user fees or general tax revenues. At a minimum, where a user fee is reasonably commensurate to the benefit received (as established here by the overwhelming support for the mushroom program in referenda of those subject to the assessments), government speech funded by the user fee should be viewed no differently from government speech funded by general tax revenues.

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[29] Cf. Laurence H. Tribe, *American Constitutional Law* § 12-4, at 807 n.14 (2d ed. 1988) (observing that, although a taxpayer might have standing to challenge "an earmarked tax" to fund government speech on a political or ideological issue, "it has been assumed that the taxpayer would lose any such challenge on the merits").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

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United States of America and
United States Department of Agriculture,

Petitioners,

v.

United Foods, Inc.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

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RULE 29.6 STATEMENT

Pictsweet, L.L.C. is the parent corporation of respondent United Foods, Inc. No other company owns 10% or more of respondent's stock.

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BRIEF FOR THE RESPONDENT

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The appendix reproduces the relevant provisions of the Mushroom Promotion, Research, and Consumer Information Act, as well as the relevant provisions of the regulations promulgated pursuant to the Act.

STATEMENT OF THE CASE

In *Glickman* v. *Wileman Brothers & Elliott, Inc.* – which sustained the generic advertising component of comprehensive "marketing orders" for California tree fruit – the Solicitor General pointedly acknowledged that "the Government would lose in this case" but for the fact that the orders furthered an important interest in "regulating these commodities and establishing orderly marketing conditions." Oral Arg. Trans., No. 95-1184, at 13. The Court's subsequent opinion turned on precisely that point, holding that the advertising assessments presented no issue under the First Amendment but rather were integral to the orders' scheme of market regulation and therefore were properly scrutinized and sustained as "economic regulations." The Court took care to "*stress* the importance of the statutory context" in which the collective, generic advertising was funded: "detailed marketing orders that have displaced many aspects of independent business activity" establish "a broader collective enterprise in which [the tree fruit producers'] freedom to act independently is already constrained by the regulatory scheme." 521 U.S. 457, 469 (1997) (emphasis added).

In this case, the Sixth Circuit invalidated a very different assessment scheme that funds generic advertising of mushrooms. As the court of appeals explained, the mushroom market "is entirely different from the collectivized California tree fruit business" because it "has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or

otherwise subsidized through price supports or restrictions on supply." Pet. App. 5a, 8a. Indeed, the statute and order at issue in this case *forbid* the collective measures that were the key to *Wileman*'s holding. Both industry proponents and their congressional supporters furthermore took pains to explain that the compelled advertising program would not include the supply controls contained in marketing orders.

The Sixth Circuit's judgment invalidating the mushroom assessment should be affirmed. This case is properly distinguished from *Wileman*. Nor is the assessment properly sustained on the "government speech" theory raised for the first time in this entire case in the government's brief on the merits in this Court. Therefore, the assessment for mushroom advertising can be sustained only if it is, at the least, "germane" to a broader federal regulatory program. But no such program even exists. Nor does the government argue that the advertising scheme can be sustained under the scrutiny applicable to regulations of commercial speech. The First Amendment accordingly precludes the government from compelling respondent to fund this advertising program.

1. United Foods' Operations. Respondent United Foods produces a number of agricultural commodities, including mushrooms, which it sells in three regional markets.

a. United Foods operates mushroom farms in Ventura, California (serving Southern California and Arizona); Salem, Oregon (serving the Pacific Northwest); and Fillmore, Utah (serving the Central Rocky Mountain States). J.A. 141. Three characteristics of mushrooms confine United Foods' distribution to these regional markets: they (i) have a low density that makes shipping costly; (ii) spoil soon after harvesting; and (iii) are easily bruised in transit.[1]

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[1] See J.A. 86, 145, 148; U.S.D.A., Agric. Mktg. Serv., THE U.S. MUSHROOM INDUSTRY: THE IMPORT CHALLENGE 68-69 (1982) ("*U.S.D.A. Mushroom Report*") ("As a general rule, mushrooms arrive at the repacking plant on the same day they are picked. * * * * Shelf

Because United Foods competes with only a small number of mushroom suppliers in each self-contained local market, its marketing efforts are local, rather than national. In marketing, United Foods differentiates its "Pictsweet" brand mushrooms and its service to retailers as superior to the competition. United Foods' competitive advantage arises from its substantial investments in research, production, and distribution, as well as its experience as a grower and marketer of other vegetables. Among other things, Pictsweet mushrooms are fresher (because United Foods gets them to retailers faster) and of higher quality (because of the superior growing conditions and quality controls at United Foods' mushroom farms). See J.A. 113-14, 147, 149, 152, 158, 185, 201.[2]

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life of bulk mushrooms was estimated to range from 3 to 6 days, with an average of 5 days."); Hearings Before the Subcomm. on Domestic Mktg., Consumer Relations, and Nutrition, Comm. on Agric., 101st Cong., 1st Sess., *Research, Promotion, and Consumer Information Programs* 111 (1989) ("*Mushroom Act Hearings*") (Kirk Leighton, Pres., Camsco Produce Co.) ("[T]he base of the issue of regionality is the fact that mushrooms basically do not travel well. They have a very short shelf life and are highly perishable, among the most perishable of all produce items available. That perishability requires that they be marketed generally within several hundred miles of where they are grown."); W.C. Lane, *Mushroom Marketing in the 80's*, *in* PROCEEDINGS OF THE ELEVENTH INT'L SCIENTIFIC CONGRESS ON THE CULTIVATION OF EDIBLE FUNGI 631, 634 (1981) (mushroom producers must "maximize distribution in the areas closest to our production").

[2] In its local markets, United Foods expends considerable sums to promote its Pictsweet brand name, generally in coordination with local grocers, to encourage purchasing of United Foods mushrooms as opposed to other brands. For example, with certain grocers, United Foods assists in shelf-space planning, subsidizes newspaper advertising, provides point-of-sale promotions, and conducts in-store demonstrations and tastings. J.A. 153-54, 157, 159. United Foods believes, based on its considerable industry experience, that it is essential to target marketing in this fashion because mushrooms are perceived by the public as a discretionary, gourmet item and therefore are attractive only to certain consumers.

2. The Mushroom Market. The mushroom industry is characterized by vigorous competition, extraordinary stability, and elasticity of supply. *E.g.*, Jim Offner, *Mushrooms: Record Year Raises Hopes For Future*, THE PACKER, Sept. 11, 2000, at A2 (reporting view of the President of the Mushroom Council that the market is typified by "a stable price, with increasing supplies"); see also *U.S.D.A. Mushroom Report*, *supra*, at 97 (describing prices for fresh mushrooms as "highly stable").

The stability of the mushroom market reflects the unique nature of mushroom production. Mushroom farms are entirely insulated from the weather in warehouse-like buildings, in which factors such as temperature, humidity, and carbon dioxide levels are closely controlled within "growing rooms" to maintain optimal conditions during the sixty- to ninety-day growing cycle. See U.S.D.A., *An Economic Assessment of Mushrooms: Executive Summary* (undated), <<*www.act.fcic.usda.gov/pilots/feasible/txt/mushroom.txt*>> (visited Oct. 5, 2000) ("[V]irtually all commercial mushroom production occurs indoors, where it is largely isolated from naturally-occurring perils, such as unseasonable cold, moisture extremes, wind storms, and hail, which cause most yield losses among outdoor crops."). As explained by the President of the Mushroom Council, given the system of indoor production in carefully controlled conditions, "Mushroom farming is more like IBM than agriculture." Amy M. Starke, *Earthy Delights*, THE OREGONIAN, Jan. 18, 2000, at FD1.

"Mushrooms are available year round, largely because of controlled growing conditions in facilities in 38 states." H.R. Rep. 101-568, *Omnibus Agricultural Commodity Promotion and Research Act of 1990*, 101st Cong., 2d Sess. 45 (1990) ("*Mushroom Act Report*"). At any given time, growers will have mushrooms at every stage of production and (because of the exceedingly short growing cycle, the flexibility afforded by the numerous growing rooms, and the small capital investment required to shift production levels) can quickly and

inexpensively increase or decrease production in response to changing local market conditions.

3. Federal Regulation Of Agricultural Marketing. The federal government has adopted three approaches to the marketing and distribution of agricultural commodities.

a. Hundreds of commodities – a majority several times over – are not subject to any federal marketing controls at all. These include *all* of the other agricultural products that respondent sells, including, *e.g.*, corn, carrots, broccoli, green beans, spinach, lima beans, green peas, black-eyed peas of several kinds, southern greens (collards, turnips, kale, and mustard), cauliflower, peppers, brussels sprouts, and okra. J.A. 140, 184.

b. The marketing and distribution of approximately three dozen other commodities – including the California tree fruits at issue in *Wileman* – are subject to extensive federal regulation under "marketing orders" issued pursuant to the Agricultural Marketing Agreement Act ("AMAA"), 7 U.S.C. § 601 *et seq*. Congress enacted the AMAA in the aftermath of the great agricultural instability of the 1930s in an effort to stabilize volatile commodity markets. See *id.* § 602(1) (purpose to "establish and maintain * * * orderly marketing"), (2) (maintain fair prices), (3) ("effectuate * * * orderly marketing").

The principal features of marketing orders are measures designed to stabilize supplies and prices by regulating supply and facilitating collective action among producers. As this Court detailed in *Wileman*:

> Marketing orders promulgated pursuant to the AMAA are a species of economic regulation that has displaced competition in a number of discrete markets; they are expressly exempted from the antitrust laws. § 608b. Collective action, rather than the aggregate consequences of independent competitive choices, characterizes these regulated markets. In order "to avoid unreasonable fluctuations in supplies and prices,"

> § 602(4), these orders may include mechanisms that provide a uniform prices to all producers in a particular market, that limit the quality and the quantity of the commodity that may be marketed, §§ 608c(6)(A), (7), that determine the grade and size of the commodity, § 608c(6)(A), and that make an orderly disposition of any surplus that might depress market prices, *ibid.* Pursuant to the policy of collective, rather than competitive marketing, the orders also authorize joint research and development projects, inspection procedures that ensure uniform quality, and even certain standardized packaging requirements. §§ 608c(6)(D), (H), (I).

521 U.S. at 461.

Activities under marketing orders are funded through assessments on producers. 7 U.S.C. §§ 608c(6)(I), 610(b)(2)(ii). Beginning in the 1960s, Congress enacted a series of amendments to the AMAA (applicable to some but not all commodities) that permit use of assessed funds to pay for generic advertising. See *Wileman*, 521 U.S. at 462.

c. A far smaller group of commodities – including mushrooms, cultivated blueberries, honey, peanuts, popcorn, potatoes, and watermelons – are subject to a third scheme of commodity marketing: "research and promotion programs." See Pet. 13-14 & n.7 (listing programs).[3] These programs have been adopted not to stabilize volatile markets but instead to "expand, maintain, and develop" existing markets – *i.e.*, simply to sell more of the particular commodity. U.S.D.A., Agric. Mktg. Serv., *Research and Promotion Programs*, <<*www.ams.usda.gov/fv/rpb.html*>> (visited Feb. 18, 2001).[4]

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[3] Within the Department of Agriculture, these programs are administered by the "Research and Promotion Branch" while marketing orders are administered by a distinct entity, the "Marketing Order Administration Branch."

[4] In 1996, Congress authorized the Department of Agriculture to institute research and promotion programs for various commodities

Research and promotion programs do not authorize – indeed, they generally forbid – the market intervention that is the hallmark of marketing orders enacted pursuant to the AMAA. *E.g.*, 7 C.F.R. § 1207.335(b) (potato research and promotion program; "quality control, grade standards and supply management programs shall not be conducted under, or as a part of, this plan"); *id.* § 1210.331(b) (watermelon program; similar); see also *infra* at 9-10 (detailing provisions of mushroom order). Their core provision is instead an assessment, such as on every pound of mushrooms produced domestically or imported, that must be paid to a commodity board to finance generic advertising; failure to pay the assessment is a violation of federal law.

4. The "Mushroom Act" and "Mushroom Order." Given the consistent stability of the U.S. mushroom market, the federal government has elected not to regulate mushroom production or sales. The government does not have any programs to modulate supplies, whether directly through quotas or price controls, or indirectly through grade or packaging requirements. The only substantial federal regulation of the industry is the research and promotion program at issue in this case.

a. In the federal government's most comprehensive study of mushroom marketing, the Department of Agriculture recognized that the industry could seek federal authorization for an "involuntary" program of "industry promotion." *U.S.D.A. Mushroom Report*, *supra*, at 100. One of the two principal options was a marketing order that could include "regulatory aspects designed to promote orderly marketing." *Id.* "A Federal marketing order could provide for product inspection and the independent assignment of grades. A marketing order

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without seeking specific congressional authorization. See Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, tit. V, subtit. A, 110 Stat. 888, 1029 (1996), *codified at* 7 U.S.C. § 7401.

also could provide for better application of industrywide grading standards." *Id.* at 104. See also *id.* at 102 ("the regulatory aspects of the Federal order program" would be "a means to ameliorate the market access and equity problem" suffered by smaller producers). The report recognized that the industry could pursue, as the "*alternative* to a Federal marketing order program," "specific 'free standing' legislation to authorize the establishment of a promotion and research program for mushrooms." *Id.* at 100-01 (emphasis added).

This federal study was not a call to governmental action; to the contrary, the U.S.D.A. flatly concluded that any "initiative for any course of action * * * rests entirely with the industry." *U.S.D.A. Mushroom Report*, *supra*, at 102. In 1989, a consortium of principally smaller mushroom producers did, in fact, pursue the "alternative" to a marketing order: a "research and promotion program" to compel all producers to finance generic advertising without employing the supply-side measures of marketing orders.

The mushroom producers who drafted and proposed the statute emphatically distinguished it from "price supports or a federal marketing order," taking care to "*clearly state* that we have *no desire* to pursue any supply management efforts. The goals of this legislation and the program are focused *solely* on the demand side of the equation." *Mushroom Act Hearings*, *supra*, at 136-37 (Dennis Zensen, then-Chairman of Mushroom Council) (emphases added). Congressional supporters, in turn, favored the legislation over "other proposals" and alternative "approach[es] to marketing order programs" precisely because it did *not* involve economic regulation, which they regarded as "the artificial bolstering of indigenous industries by exclusionary measures [that] is entirely antithetical to a free market." 136 Cong. Rec. S10,822 (daily ed. July 26, 1990) (Sen. Heinz).

b. Congress authorized the research and promotion program by enacting the Mushroom Promotion, Research, and Consumer Information Act ("Mushroom Act"). Pub. L. No.

101-624, §§ 1921-1933 (Food, Agriculture, Conservation, and Trade Act of 1990, tit. XIX, subtit. B, 104 Stat. 3854-3865), *codified at* 7 U.S.C. § 6101-6112. The Department of Agriculture, in turn, implemented the program in 1993 in the "Mushroom Order." 7 C.F.R. pt. 1209; see 58 Fed. Reg. 3446 (1993).

The Act and Order eschew the market-intervention measures contained in marketing orders under the AMAA. They may not be construed to permit "the control of production or otherwise limit the right of individual producers to produce mushrooms" or to impose "mandatory requirements for quality control, grade standards, supply management programs, or other programs that would control production." 7 U.S.C. § 6101(c); 7 C.F.R. § 1209.40(a)(2). See also *infra* at 32-33 (describing how grade standards applicable to other commodities, such as tree fruit, function as supply controls). Nor do they immunize activities under the Act or Order from the federal antitrust laws or otherwise facilitate collective action rather than competition in the mushroom market.

The Mushroom Act and Order instead provide for mandatory assessments to fund generic advertising. The Act establishes a Mushroom Council, composed of nine producers, which collects a mandatory volume-based assessment[5] applicable to all producers and importers of at least 500,000 pounds of mushrooms annually for the "fresh" market. 7 U.S.C. § 6102(9), 7 C.F.R. §§ 1209.11, .51, .52; see also 7 C.F.R. § 3.91(b)(xxix) (penalty for noncompliance).[6] At least

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[5] The assessment varies annually, and generally ranges between approximately one-quarter cent and one-half cent per pound. See 7 U.S.C. § 6104(g)(2)(D) (maximum rate is one cent per pound). In response to the Sixth Circuit's decision in this case, the assessment was lowered to one-tenth cent per pound and then raised again to one-quarter cent on a temporary basis.

[6] Approximately 150 mushroom producers pay the assessment. See J.A. 87, 129; U.S.D.A., Agric. Mktg. Serv., *Mushroom Promotion and Consumer Information Order*, <<*www.ams.usda.gov/fv/mush*

98% of the $2.3 million in annual expenditures is used to finance speech (*i.e.*, paid advertising, industry information programs, or similar efforts) and the administrative support for that speech. See J.A. 229. Although a provision of the Act would permit expenditures for "research" as well, see 7 U.S.C. § 6104(c)(4), that provision is moribund.[7]

The Council has the exclusive discretion to design and implement generic promotional programs of its choosing. 7 C.F.R. § 1209.38(a). The Secretary of Agriculture's power is limited to vetoing the Council's proposals. See *id.* § 1209.39(b). The Secretary does not engage in any ongoing oversight of the promotional programs or the Council's activities generally other than to ensure compliance with the basic statutory framework. See *infra* at 48-50.

5. United Foods' Objections to the Compelled Advertising Scheme. United Foods' private ownership objects to the Council's use of respondent's support to attach to mushrooms certain social and ideological connotations. Inherent in the design of the Council is that the message conveyed by the generic advertising will be selected not only by United Foods' competitors, but by competitors that do not share its values. This is a particular concern because the Council uses all of the tools of modern advertising, including appeals to values and social mores. United Foods specifically objects that the Council has associated itself and mushrooms generally with the consumption of alcohol and has touted mushrooms as an aphrodisiac. *E.g.*, J.A. 173.

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room.html>> (visited Feb. 18, 2001). Prior to this litigation, respondent paid approximately $100,000 annually. J.A. 58.

[7] See J.A. 229 (no budgeted expenditures for research). A line item in the Council's Statement of Budgeted versus Actual expenditures lists a $36,251 expenditure (1.5% of all expenses) for "Research," but that may be in error because that line item is identified instead as "Program Evaluations" in the budget. Compare *id.* 231 with *id.* 229.

The Council's promotional programs also undermine United Foods' effort to distinguish its Pictsweet brand from the competition, as well as its effort to tailor marketing to local retail conditions, all without any corresponding regulatory benefit. The very purpose of generic advertising is to suggest that a commodity is homogenized – here, the Council's "if you've seen one mushroom, you've seen them all" approach to promotions conveys the message that all mushrooms are the same.[8]

In this respect, the Mushroom Order requires United Foods to finance advertising that (to the extent it is effective at all) will only benefit respondent's competitors, who generally do not sell on a branded basis. Indeed, to combat the effects of generic advertising, United Foods would have to engage in further branded advertising, effectively engaging in counter-speech against the very programs it is being forced to fund under the Mushroom Order. See Br. of U.S., *Wileman*, No. 95-1184, at 20 (objecting producers have option "to advertise their own products, to criticize their competitors' products, and even to criticize the generic advertisements created pursuant to the marketing orders"). And, as is discussed in greater detail *infra* at 16-17, the Order permits smaller producers and producers in regions in which United Foods does not operate to "free ride" on the advertising respondent funds.

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[8] See, *e.g.*, John E. Lenz & Olan D. Forker, *Generic Advertising as a Nonprice Marketing Strategy*, *in* COMPETITIVE STRATEGY ANALYSIS IN THE FOOD SYSTEM 137, 142 (Ronald W. Cotterill ed., 1993) (because "[g]eneric advertising is not brand specific [but instead] focus[es] on product or commodity characteristics common to all product items and brands," it is "possible that generic advertising could erode brand preference" resulting in "brands which are attempting counterfactual product differentiation seeing an erosion of their brand franchises"); Ronald W. Ward, *Domestic Commodity Check-Off Programs: Judging Their Impact*, *in* COMMODITY PROMOTION POLICY IN A GLOBAL ECONOMY 33, 36 (Walter J. Armbruster & John E. Lenz eds., 1993) (recognizing "arguments that generic programs can be biased against brands").

6. The Proceedings Below. Based on its objections to the generic advertising program, United Foods filed a petition with the Secretary of Agriculture, see 7 U.S.C. § 6106(a)(1), seeking a determination that the assessment violates the First Amendment. The United States in turn filed suit in federal district court in Tennessee, see *id.* § 6107(a), seeking to compel United Foods to pay the assessment. Without holding a hearing, the administrative law judge and a judicial officer of the Department of Agriculture subsequently rejected United Foods' claim, and respondent sought review in the same district court. See *id.* § 6106(b)(1).

The district court consolidated both actions and granted the government's motion for summary judgment, which rested entirely on this Court's decision in *Wileman*. Pet. App. 20a. According to the district court, "[t]he *Wileman* decision did not turn on the degree to which [the] State or Federal Government has otherwise displaced free market competition." *Id.* 18a (citation omitted).

On United Foods' appeal, the Sixth Circuit reversed. Devoting nearly the whole of its opinion to an analysis of *Wileman*, the Sixth Circuit "conclude[d] that the explanation for the *Wileman* decision is to be found in the fact that the California tree fruit industry is fully collectivized and is no longer a part of a free market, as well as in the nonpolitical nature of the compelled speech." *Id.* 7a. Compelled promotion programs are accordingly sustainable without any special First Amendment scrutiny, the Sixth Circuit reasoned, if they are part and parcel of a broader scheme of government regulation – in effect, a neutral set of rules of general applicability. "The purpose of this principle joining regulation and content is to deter free riders who take advantage of their monopoly power resulting from regulation of price and supply without paying for whatever commercial benefits such free riders receive at the hands of the government." Pet. App. 7a-8a. In other words, "If an economic actor chooses to remain aloof from the regulated industry, he owes no reciprocal duty to promote

the industry; but if he chooses to join, he has a reciprocal duty to promote its interest." *Id.* 8a. The court of appeals therefore concluded that *Wileman* insulates from First Amendment challenge compelled promotion schemes that are "'germane to the purposes'" of market regulation, *id.* 6a (quoting *Wileman*, 521 U.S. at 473), or that present "some other compelling justification," *id.* 7a.

Applying this analysis, the Sixth Circuit found that the mushroom assessment was not entitled to deferential treatment as an "economic regulation" under *Wileman* because "the mushroom business is entirely different from the collectivized California tree fruit business. Mushrooms are unregulated." Pet. App. 8a. "[T]he mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply." *Id.* 5a. Indeed, "[t]he Act *does not permit* the regulation of prices or mandatory quantity or quality controls of mushrooms produced and sold by farmers, nor does it subsidize or restrict the growth of mushrooms or otherwise collectivize the industry." *Id.* 2a n.1 (emphasis added). Accordingly, "the mushroom advertising program before us is not 'germane' to any collective program setting prices or supply." *Id.* 7a. Because the government did not maintain that the assessment could survive First Amendment scrutiny, the court of appeals held it invalid. *Id.* 8a.

SUMMARY OF ARGUMENT

The government's only argument is that the Sixth Circuit erred in subjecting the mushroom assessment to First Amendment scrutiny. If this Court disagrees, then the assessment is plainly invalid. Not only is the stand-alone advertising program not "germane" to any broader regulatory scheme (compare *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (assessment germane to unions' collective bargaining activities)) but there is no serious argument that it can be sustained under the scrutiny applicable to regulations of

commercial speech (see *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)). Specifically, the mushroom assessment does not further any substantial government interest. It facilitates, rather than eliminates, "free riding" by exempting small mushroom producers and shifting advertising spending to regions in which the primary payors of the assessment do not compete. Moreover, the Mushroom Council's generic advertising does not increase mushroom sales and, even if it did, it would not substantially benefit the producers who principally pay the assessment. Finally, the scheme of federal regulation of commodity marketing is essentially irrational, exhibiting no rhyme or reason in respect of the agricultural products subject to no regulation at all, heavy regulation under marketing orders, or (as in this case) compelled generic advertising.

The government's argument that this Court's decision in *Wileman* immunizes the Mushroom Order from First Amendment scrutiny is erroneous. *Wileman* is limited to the context of marketing orders that regulate supplies. Because marketing orders have the effect of homogenizing the subject commodity, *Wileman* concluded that, as a related economic matter, the government may include provisions facilitating generic advertising that reflects the commodity's common features. Research and promotion programs such as the Mushroom Order, by contrast, forbid the direct and indirect supply controls of marketing orders. Indeed, the statute in this case reflects Congress' conscious determination *not* to engage in economic regulation of the mushroom market. The Solicitor General's further attempt to extend *Wileman* to apply to all non-ideological advertising schemes conflicts with several decisions holding that compelled assessments are constitutional only if "germane" to a regulatory program, as well as with this Court's commercial speech jurisprudence.

Nor is the Solicitor General correct that the mushroom assessment is immune from First Amendment scrutiny as "government speech." That argument is not properly presented

because it was not "pressed in or passed upon" below and is not fairly included in the question presented. Questions of "government speech" are furthermore irrelevant to respondent's allegation that the First Amendment applies to a targeted assessment compelling United Foods to finance the Mushroom Council's message. Rather than challenging the government's right to convey a particular message, United Foods asserts that First Amendment scrutiny applies to a requirement that it directly support and associate with that message. In any event, the Mushroom Council does not engage in "government speech" but rather is a fundamentally private entity promulgating a private message. The Department of Agriculture's oversight is minimal and, of particular importance, does not extend to shaping the Council's promotional message.

ARGUMENT

I. It Is Undisputed That If The Mushroom Assessment Is Subject To First Amendment Scrutiny, It Is Invalid.

It is appropriate to begin by briefly addressing the question left unanswered by the Solicitor General's brief: what if the Court concludes that this case is distinguishable from *Wileman* and that the mushroom assessment is accordingly subject to First Amendment scrutiny rather than highly deferential treatment as an "economic regulation"? The answer is that the assessment is invalid. The assessment scheme is not "germane" to any non-speech-compelling collective program instituted by Congress. Compare *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977).[9] Nor does the government main-

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[9] It is no answer to say that the assessment is, in effect, "germane" to itself – *i.e.*, to the generic advertising of mushrooms. This Court has never read the *Abood* line of cases so broadly as to rubber stamp exactions to fund speech outside the context of a broader regulatory scheme. To the contrary, based on the First Amendment, the Court has consistently construed the federal labor laws to *forbid* the

tain that it could be sustained under the test applicable to regulations of commercial speech. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). Instead, the government argues exclusively that the Sixth Circuit mischaracterized the mushroom assessment as a regulation of private speech. Compare Br. of U.S., *Wileman*, No. 95-1184, at 34-48 (extensive argument that assessment for tree fruit could be sustained under *Central Hudson* framework). Although the government has therefore waived the point, it is useful to explain why the assessment scheme cannot withstand First Amendment scrutiny in order to illustrate that the Mushroom Order simply requires respondent to finance advertising to benefit its competitors, and accordingly is subject to First Amendment scrutiny as a regulation of commercial speech.

The principal interest said to underlie the Mushroom Order is that it prevents "free riding." See U.S. Br. 26, 30. If that were actually so, however, respondent would be granted a credit towards the substantial advertising it undertakes on its own. Compare 7 U.S.C. § 608c(6)(I) (credit provided under AMAA for advertising of almonds, filberts, raisins, walnuts, olives, Florida Indian River grapefruit, and cranberries).[10] Furthermore, contrary to its avowed purpose, the Order in reality permits small producers to "free ride" on respondent's contributions for paid advertising. A principal impetus for the Mushroom Act was the desire of some segments of the industry to protect small producers by diverting larger producers' advertising expenditures away from branded promotions to

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use of exactions to fund speech unrelated to collective bargaining activities. See *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 556-56 (1991) (Scalia, J., concurring) (collecting cases).

[10] The failure of the Act and Order substantially to further a governmental interest in preventing free-riding is itself an independent basis for invalidating the assessment under the *Abood* line of cases. See *Air Line Pilots Ass'n* v. *Miller*, 523 U.S. 866, 874 (1998) (discussing *Lehnert*, 500 U.S. at 519).

generic promotions that will benefit small producers.[11] Indeed, the statute's objective is completely transparent in that it exempts from the assessment the more than one-half of all mushroom growers who produce less than 500,000 pounds annually. See 7 U.S.C. § 1209.52; U.S.D.A., Agric. Mktg. Serv., *Mushroom Promotion, Research, and Consumer Information Order* (Sept. 18, 2000), <<*www.ams.usda.gov/fv/rpmushroom.html*>> (visited Feb. 18, 2001). The House Report on the Mushroom Act candidly acknowledges that producers of fewer than 500,000 pounds of mushrooms annually "would not be assessed, although they would experience many of the same benefits from the program as other producers." *Mushroom Act Report*, *supra*, at 44. See also *Mushroom Act Hearings*, *supra*, at 135-36 (Zensen) (exemption for growers of less than 500,000 pounds of mushroom annually was intended to protect "small producers," notwithstanding that "the benefits of the program would accrue to them as well"). United Foods is thus not seeking to "free ride" on the Council's advertising but rather, as the California Supreme Court recently concluded in a similar case, is "making an effort to prevent others from hijacking [its] own funds as they drive to their own destination." *Gerawan Farming* v. *Lyons*, 12 P.3d 720, 743 (2000).[12]

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[11] See *Mushroom Act Hearings*, *supra*, at 109 (Leighton) (under Act's assessment provisions, five major growers will be responsible for "50 percent of the funding, in comparison to the estimated 300 growers across the country"). Prior to the statute's adoption, smaller producers demonstrated "a surprising lack of effort directed at increasing the level of mushroom sales through product promotions," while larger firms generally "utilized a mushroom sales force of from 8 to 12 persons, and all firms had assigned sales responsibilities to personnel in senior executive positions." *U.S.D.A. Mushroom Report*, *supra*, at 60.

[12] Proponents of the Act thus admitted that they were acting in substantial part as a result of the "strong consolidation occurring within [the] industry," with "[c]orporate entities" increasingly absorb-

The regional "free-riding" effect is just as substantial. Although United Foods cannot distribute its products beyond three specific markets, the volume-based assessments collected from United Foods – which are substantial given respondent's dominant position in those markets – are used to finance advertising principally in other regions of the country. J.A. 177-78, 201-02.[13] In other words, in contrast to California tree-fruit producers (who could distribute their products anywhere in the country and therefore stood to benefit from national growth in fruit consumption), United Foods does not stand to benefit from most of the Council's efforts. See Lane, *supra*, at 636 ("you would have to first distribute on a national basis for the individual grower to justify this type [of] promotion"). The benefits accrue instead to small mushroom producers located in markets in which United Foods does not participate – producers that could not otherwise afford advertising, and a majority of whom are entirely exempt from paying assessments under the Order.

Nor can United Foods be said to "free ride" on the benefits of generic advertising in the markets in which it operates. Even if the Council's efforts increased demand in those markets, respondent would not benefit because mushroom supplies are highly elastic, such that increased supplies from

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ing or displacing smaller producers. *Mushroom Act Hearings*, *supra*, at 101 (Zensen). See also *id.* at 95 (Ciarrocchi) (similar).

[13] The Mushroom Council's goal of increasing the per-capita consumption of mushrooms, J.A. 87, logically is targeted to regions where branded advertising has not already raised consumption levels. See *Mushroom Act Hearings*, *supra*, at 105 (Zensen) (relatively small segment of U.S. population consumes a substantial majority of all mushrooms); *U.S.D.A. Mushroom Report*, *supra*, at 93-94 (while per capita consumption in northeastern U.S. was 1.45 pounds in 1980, consumption in developed California market was 3.6 pounds); Lane, *supra*, at 641 (regions with existing branded marketing have already increased per-capita consumption). See also, *e.g.*, J.A. 217-18 (discussing high-cost programs in regions in which United Foods does not operate).

competitors will preclude United Foods from increasing its sales or benefiting from higher prices. Not only can competing mushroom farms quickly increase production, but they can easily shift their production from the "processed" mushroom market (principally used for canned mushrooms) to the "fresh" market. J.A. 199.[14] Finally, there is substantial reason to believe that any profits resulting from generic advertising are captured by intermediaries in the marketplace rather than by producers.[15]

Nor does the mushroom assessment further a substantial governmental interest in increasing mushroom consumption (an interest that would, in any event, not be "tailored" to the assessment scheme for the reasons just described). The Council budget is too small to increase mushroom consumption (particularly given that the industry is highly competitive and already contains substantial private advertising). The Council's generic advertising also fails to account for local conditions and the specific consumers likely to purchase mushrooms. Not surprisingly, the evidence demonstrates, and

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[14] The Order thus engenders free-riding in yet another way: producers who sell principally in the "processed" market are exempt from the assessment (which applies only to those who sell at least 500,000 pounds annually in the "fresh" market) but can shift their sales to the "fresh" market in periods of high demand. Other market participants who benefit from higher sales, such as mushroom processors, are similarly exempt from paying the assessment. J.A. 181, 199, 204.

[15] See Dennis R. Henderson, *Commodity Promotion Policy in a Global Economy: Concluding Challenges*, *in* COMMODITY PROMOTION POLICY IN A GLOBAL ECONOMY, *supra*, at 157, 158-59 (criticizing assumption that benefits of generic advertising flow to producers as "heroic" because, *inter alia*, market intermediaries can capture revenue growth and "it is equally reasonable to expect that revenue enhancement at the industry level will result in entry, not in rent extraction, by existing firms"); *U.S.D.A. Mushroom Report*, *supra*, at 11-12 ("An examination of sales to the fresh market over time indicates that the processing sector has become only a residual claimant for mushrooms.").

the Solicitor General does not contest, that the Council's advertising has produced absolutely no demonstrated effect on the marketplace. See Decision on Respondent's Motion for Reconsideration, *In re Donald B. Mills, Inc.*, MPRCIA Dkt. No. 95-1, at 7-8 (June 12, 1996) ("Because the evidence has not shown that the Mushroom Council was better able to promote and increase consumption of mushrooms than [private] producer-handlers, or to increase consumption at all, the Mushroom Promotion Council's program has not been shown to directly advance the government's interest in stimulating and expanding the mushroom industry."), *rev'd on other grounds*, No. CV-F-97-5890 (E.D. Cal. Mar. 5, 1998). See generally J.A. 89, 93-94, 95, 120, 126, 132.[16]

The suggestion that commodity promotion programs are necessary to sustain agricultural markets is also belied by the fact that the mushroom industry was stable and growing before the Act was adopted,[17] as well as by the irrationality of the overall scheme of federal regulation of agricultural marketing. There is no rhyme or reason behind the decision to subject indistinguishable commodities to no federal marketing

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[16] Even authors of studies suggesting that generic advertising increases demand caution that "research has not been completed for many commodities and one *must not* extrapolate these positive examples to all other commodities." Olan D. Forker & Ronald W. Ward, *Commodity checkoff programs: A self-help marketing tool for the nation's farmers?*, CHOICES 21, 25 (4th Quar. 1993) (emphasis added). The Department of Agriculture itself concedes that "[m]any questions remain unanswered about the effects of these programs on sales and producer net returns, the distribution of returns between producers and marketers, and intercommodity competition." U.S.D.A., Econ. Rsch. Serv., *Generic Commodity Advertising & Promotion* 1 (June 1993).

[17] See *Mushroom Act Hearings*, *supra*, at 99 (Rep. Grant) (in the decade prior to adoption of the Mushroom Act, fresh mushroom sales doubled); *id.* at 108 (Leighton) (8% annual growth between 1980 and 1989); see also *U.S.D.A. Mushroom Report*, *supra*, at 11 (during 1970s, "in most dimensions the industry experienced an extremely favorable growth rate").

regulation, to the comprehensive market regulation of AMAA marketing orders, or to the advertising compulsion of research and promotion programs. As Justice Souter explained in his *Wileman* dissent without contradiction by the majority, adoption of these programs is "so random * * * as to unsettle any inference that the Government's asserted interest is either substantial or even real." 521 U.S. at 495.

Accordingly, if the mushroom assessment is subject to First Amendment scrutiny, it is invalid.

II. *Wileman* And Related Precedents Hold That Compelled Advertising Assessments Are Constitutional Only If, At The Least, They Are Germane To Comprehensive Market Regulations.

In *Glickman* v. *Wileman Brothers & Elliott, Inc.*, this Court held that assessments to finance generic advertising included within comprehensive AMAA marketing orders were properly scrutinized and sustained as "economic regulations." That holding is inapposite to "research and promotion programs" such as the Mushroom Order, which are accordingly subject to First Amendment scrutiny.

A. *Wileman* Turned On The Comprehensive Nature Of Marketing Orders Under The Agricultural Marketing Agreement Act.

Wileman involved federal marketing orders for California tree fruit issued under the AMAA. In response to the plaintiffs' allegation that the orders' provisions compelling producers to finance generic advertising violated the First Amendment, the Solicitor General maintained that the advertising programs were properly regarded as nothing more than a speech-neutral form of economic regulation because they were integral to the orders' related controls on supplies. Marketing orders, the government argued, have "the non-speech-related purpose of establishing stable and orderly marketing conditions and enhancing returns to growers," which is effectuated through "an array of mechanisms * * *,

including minimum quality and maturity standards, grading and inspection requirements, production research, marketing research, and development projects." Reply Br. of the U.S., *Wileman*, No. 95-1184, at 3. "The generic advertising activities that are at issue here," the Solicitor General advised this Court, are "but one element" of that scheme and but one "part of a far broader regulatory system that does not principally concern speech." *Id* at 3-4. Indeed, the Solicitor General went so far as to concede at oral argument that, were it not for its interests in "regulating these commodities and establishing orderly market conditions," neither of which is furthered by the Mushroom Order, "then the Government would lose in this case." Oral Arg. Trans., No. 95-1184, at 13.

The Court accordingly framed as "[t]he legal question that we address," "whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve." 521 U.S. at 468. Upon a detailed review of the marketing order provisions of the AMAA (quoted *supra* at 5-6), the Court agreed with the Solicitor General, holding that the case presented no First Amendment question because "[m]arketing orders promulgated pursuant to the AMAA are a species of economic regulation that has displaced competition in a number of discrete markets," such that "[c]ollective action, rather than the aggregate consequences of independent competitive choices, characterizes these regulated markets." *Id.* at 461. "The basic policy decision that underlies the *entire statute*," the Court reasoned, is the "assumption that in the volatile markets for agricultural commodities the public will be best served by compelling cooperation among producers in making economic decisions that would be made independently in a free market." *Id.* at 475 (emphasis added).

Of particular note, the Court carefully explained that its holding was limited to the context of federal regulations that

stabilize commodity markets by collectivizing agricultural supplies:

> In answering that question [whether the challenged programs constitute economic regulations or speech restrictions] we *stress* the importance of the statutory context in which it arises. California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme. *It is in this context* that we consider whether we should review the assessments used to fund collective advertising, together with other collective activities, under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment issues.

521 U.S. at 469 (emphases added).

Wileman plainly distinguishes between markets collectivized by regulation under marketing orders, on the one hand, and free markets like the mushroom market, on the other. Grade and packaging standards have the effect of homogenizing a commodity – *i.e.*, California nectarines sold under the orders at issue in *Wileman* have a consistent quality, shape, and size, and are similarly packaged for distribution. As *Wileman* explains, "inspection procedures that ensure uniform quality" and "standardized packaging requirements" reflect "the policy of collective, rather than competitive marketing" under the AMAA. 521 U.S. at 461. *Wileman* concludes that the government could, as a related economic measure in the same marketing orders, require the producers who benefit from such collectivization to contribute to a generic advertis-

ing program that reflects the characteristics of the homogenized product. By contrast, when a commodity is sold by individual producers in a competitive market that the government has not collectivized, any attempt by the government to alter the distribution of commercial advertising is properly regarded, and scrutinized, as a regulation of free speech.[18]

B. The Solicitor General's Contrary Reading Of *Wileman* Is Incorrect.

The government devotes only three paragraphs of its brief (see Br. 24) to the assertion that research and promotion programs such as the Mushroom Order are indistinguishable from the marketing orders in *Wileman*. Instead, the government argues almost exclusively, and implausibly, that *Wileman*'s extensive, repeated, and avowed reliance on the regulatory nature of AMAA marketing orders – every single word of it – was in fact wholly irrelevant *dictum*. According to the Solicitor General, "the Court's core First Amendment analysis" appears in Part IV of the *Wileman* opinion, but Part IV fails to cross-reference the opinion's discussion of marketing orders. *Id.* 22.

The government's characterization of *Wileman* is incorrect, and it was properly rejected by the Sixth Circuit. See Pet. App. 4a (*Wileman* "emphasized and reemphasized" that the heavily regulated, collectivized nature of the California tree-fruit market was critical to the Court's decision). As just noted, the *Wileman* majority both took great care to "stress the importance of the statutory context" in which the case arose and found no First Amendment question presented because the assessments were part and parcel of a statutorily

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[18] The four *Wileman* dissenters thus disagreed with the majority principally based on their view that the advertising program was distinct from the remainder of the marketing orders' controls on commodity supplies. See 521 U.S. at 498 (Souter, J., dissenting) (advertising provisions were "simply grafted onto the [AMAA] as a convenient vehicle for the funding schemes").

mandated collectivized marketing program. That holding could not have shocked the government at the time and cannot truthfully be confusing it now, for it rested on the very argument pressed by the United States in *Wileman*. See *supra* at 21-22.

Nor will Part IV of the *Wileman* opinion bear the weight that the government places upon it. Part IV does not "contain[] the Court's core First Amendment analysis." To the contrary, the Court's determination that marketing orders, including their assessment for paid advertising, constitute "economic regulations" rather than speech restrictions appears principally in Part III, which frames the legal question before the Court ("stress[ing]" the characteristics of marketing orders) and in Part V, which analyzes the requirements of marketing orders (announcing that the Court's holding turns on those characteristics). See 521 U.S. at 469, 474-77. Part IV, by contrast, simply addresses and distinguishes the three lines of cases on which the dissent relied in arguing that the advertising component of the marketing orders could not be fairly characterized as purely economic regulation. Manifestly, those lines of cases cannot be held to exhaust the First Amendment challenges that may be brought against assessment schemes, for (as is discussed *infra* at 34-35) that result would obliterate the holding of *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991), that only assessments for "germane" activities are permissible.[19] Indeed, the very paragraph

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[19] The *Wileman* majority discussed the three lines of cases as follows. In contrast to "the limits on commercial speech at issue in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U.S. 557 (1980)," and similar cases, "the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience." 521 U.S. at 469 & n.12. In contrast to "the compelled speech in *West Virginia Bd. of Ed.* v. *Barnette*, 319 U.S. 624 (1943), [and its progeny], and the compelled association in *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995)," marketing orders "do not compel any person to engage in any actual or symbolic speech." 521 U.S. at 469 & n.13. And, in con-

on which the Solicitor General relies makes clear that the Court's holding was limited to the context of broader schemes instituting collective, rather than competitive, marketing. See *id.* at 470 ("Thus, none of our First Amendment jurisprudence provides any support for the suggestion that the promotional regulations should be scrutinized under a different standard than that applicable to the other anticompetitive features of the marketing orders.").

The government's position also cannot be reconciled with the fact that Part IV of the *Wileman* opinion *rejected* the argument that non-ideological compelled advertising programs are broadly constitutional: "our cases provide affirmative support for the proposition that assessments to fund a lawful collective program *may sometimes* be used to pay for speech over the objection of some members of the group." 521 U.S. at 472-73 (emphasis added). Part IV furthermore repeatedly states that the Court's analysis is limited to the nature of "this regulatory scheme," *id.* at 471, contrasts marketing orders with "an unregulated market," *id.* at 474, and explains that the assessment provisions could not be distinguished from "other features of the regulatory orders that impose restraints on competition," *id.* Those statements refer to the Court's earlier, meticulous discussion of the heavily regulated and collectivized nature of commodity markets subject to marketing orders. See *id.* at 461 ("Collective action, rather than the aggregate consequences of independent competitive choices, characterizes *these regulated markets*." (emphasis added)).[20]

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trast to "cases like *Machinists* v. *Street*, 367 U.S. 740 (1960)," marketing orders "do not compel the producers to endorse or to finance any political or ideological views." 521 U.S. at 469 & n.14.

[20] The government's further, highly attenuated argument that *Wileman*'s holding cannot be limited to the context of AMAA marketing orders because the Court in that case granted certiorari to resolve a circuit conflict arising in part from a decision involving the assessment for beef (U.S. Br. 23-24) is wrong for the numerous reasons detailed in the brief in opposition (BIO 15-21) but never addressed by the Solici-

III. The Assessment For Mushroom Advertising Is Properly Distinguished From Marketing Orders Issued Under The AMAA.

The Mushroom Order lacks the regulatory characteristics that led this Court in *Wileman* to hold that AMAA marketing orders, including their provisions for paid advertising, are not speech restrictions but rather are "a species of economic regulation that has displaced competition." 521 U.S. at 461.[21] The Solicitor General's passing attempt to extend *Wileman* to this context is precluded by the *Abood* line of cases as well as this Court's commercial speech jurisprudence.

A. "Research and Promotion Programs" Such As The Mushroom Order Have Very Different Characteristics And Purposes Than AMAA Marketing Orders.

As *Wileman* details, AMAA marketing orders directly regulate supplies and facilitate "[c]ollective action": they may set "a uniform price"; "limit the quality and the quantity of the commodity that may be marketed"; "determine the grade and size of the commodity"; and/or "make an orderly disposition of any surplus that might depress market prices." 521 U.S. at 461. Activities under the orders are immune from the antitrust laws. *Id.*

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tor General. Of note, the government now admits (Br. 31) that the beef market is the subject of substantial governmental regulation.

[21] There is no need in this case to decide the constitutionality of assessments applicable to agricultural products such as beef and milk that are not subject to AMAA marketing orders but, unlike mushrooms, are subject to other substantial marketing regulations. It is apparent, however, that the lower courts have looked to the full array of regulation. *E.g.*, *Gallo Cattle Co.* v. *California Milk Advisory Bd.*, 185 F.3d 969, 975 (CA9 1999); *Nature's Dairy* v. *Glickman*, No. 98-1073, 1999 U.S. App. LEXIS 3547, at *11 (CA6 Mar. 2, 1999), *cert. denied*, 528 U.S. 1074 (2000). The government offers no support for its assertion (Br. 30) that such an inquiry is unadministrable.

Federal law relating to mushroom marketing, by contrast, not only does not mandate such collective controls on supply, *it forbids them*. As noted (see *supra* at 9-10), the Mushroom Act and Order state categorically that they shall not be construed to permit either direct supply restrictions or indirect measures such as grade standards. 7 U.S.C. § 6101(c); 7 C.F.R. § 1209.40(a)(2). Nor does the Mushroom Order authorize "inspection procedures that ensure uniform quality" or "standardized packaging requirements," or provide that activities of mushroom producers under the order are exempted from the antitrust laws.

Congress' determination to employ a research and promotion program rather than a marketing order for mushrooms was a conscious one; it therefore would be particularly inappropriate to defer in this case to Congress' broader latitude over "economic" matters. After a comprehensive report by the U.S.D.A. recognized that either a marketing order or the "alternative" of a research and promotion program could be enacted for mushrooms, proponents of the Act chose the latter course. As noted (see *supra* at 8), the producers who drafted the Act were emphatic that it would not include any of the supply controls that typify marketing orders. The government similarly undermines its case in emphasizing (Br. 5, 26 n.14) that congressional supporters favored adoption of a "research and promotion program" precisely because, in contrast to the regulatory components of a marketing order, it would not involve intervention in free markets. Congress clearly determined *not* to engage in economic regulation of the mushroom market.[22]

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[22] The government's related argument (Br. 26 n.14) that Congress sometimes avoids employing marketing orders in order to avoid "antagoniz[ing] consumers" does not help its case. It is deeply troubling as a First Amendment matter that the government would avoid influencing purchasing decisions through overt efforts, such as restrictions on supplies, in favor of covert support of advertising undertaken in the name of producers.

That the federal government has made a conscious determination not to intervene in the mushroom market is also illustrated perfectly by the Solicitor General's argument (Br. 29) that, although the federal government could conceivably issue a marketing order under the AMAA for any commodity, it has not done so for mushrooms.[23] All that the U.S.D.A. has done – and all that Congress has directed it to do in the Mushroom Act – is impose mandatory assessments to be used in advertising.[24]

B. The Government's Arguments To The Contrary Are Unavailing.

The government fares no better in arguing (Br. 24-26) that the Mushroom Order is not properly subject to First Amendment scrutiny because compelled assessments for paid advertising have the same purpose and effect on the marketplace even when (as here) not included in comprehensive marketing measures. We have explained above that *Wileman* held pre-

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[23] It bears noting that, in fact, the Mushroom Order could not be issued under the AMAA, which would have to be amended by Congress to permit (i) paid advertising for mushrooms, (ii) the imposition of assessments upon importers, and (iii) the adoption of a national rather than a regional program. See *U.S.D.A. Mushroom Report*, *supra*, at 100-01. Furthermore, because producers sought only a research and promotion program, and affirmatively opposed supply controls of marketing orders, see *supra* at 8, such a marketing order likely would not have secured the super-majority support required for enactment under the AMAA. See 7 U.S.C. § 608c(9)(B).

[24] The government understandably does not argue that the research component of the Mushroom Order brings this case within the ambit of *Wileman*. "Research" is far afield from the supply-side controls and forced collectivization that characterize marketing orders. Thus, if a research program reveals a new, profitable type of mushroom or mushroom packaging, those discoveries must be employed and marketed by mushroom producers on an individual basis in an unregulated marketplace. In any event, the record reveals that the Mushroom Council expends virtually none of its approximately $2.3 million annual budget on research. See *supra* at 10 & n.7.

cisely the opposite – *i.e.*, that such assessments have the character of economic regulations rather than speech restrictions only when employed as an integral component of other controls on commodity supplies – and detail below (see *infra* at 33-39) why the government's characterization of the "purpose" and "effect" of the Mushroom Act, even if it were correct, would be irrelevant as a constitutional matter.[25]

For present purposes, however, the salient point is that the purposes and effects of AMAA marketing orders are quite different from those of the Mushroom Act and Order. The former constitute direct government intervention to stabilize certain volatile commodity markets, *Wileman*, 521 U.S. at 461 (citing 7 U.S.C. § 602(1)), while the latter are nothing more than advertising programs intended to "expand" a commodity market that does not otherwise require government intervention, *e.g.*, 7 U.S.C. § 6101(b) (Mushroom Act).

In contrast to the inherently unstable market for California tree fruit, the mushroom market is uniquely stable as a result of indoor, near-industrial growing conditions, as well as short growing cycles that permit easy adjustment to shifts in demand. See *supra* at 4. Accord *Mushroom Act Hearings*, *supra*, at 108 (Leighton) (stability of the mushroom industry is accordingly "far different than the situations that have been developed with pork and beef and other such orders where distress and decline was more the watch word than the growth [mushroom producers] have seen").[26] Mushrooms are ac-

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[25] This certainly is not the only context in which governmental activity that otherwise would be constitutionally impermissible is sustained in the context of a regulated industry. Although for different reasons, that is the rule under the Fourth Amendment as well. *E.g.*, *New York* v. *Burger*, 482 U.S. 691 (1987) (owners of regulated junkyards have reduced expectation of privacy).

[26] The principal factors destabilizing the tree fruit market are the long lead time from planting until maturity and the large capital commitment incurred at the time of planting. Growers respond to higher prices by enlarging their orchards. By the time new plantings are at

cordingly subject only to a research and promotion program. That program's effort at market expansion is nothing more than an effort to use advertising – *i.e.*, constitutionally protected commercial speech – to sell more mushrooms, not an "economic regulation" immune from any and all First Amendment scrutiny.

The Solicitor General's repeated assertion that both marketing orders and research and promotion programs seek to avoid "free riders" (*e.g.*, Br. 26, 30) is not correct either. As the Sixth Circuit explained, in the context of the AMAA, the government has a non-speech-related interest in ensuring that individual producers do not "free ride" on the benefits provided by marketing orders' collectivized controls on commodity supplies. Here, by contrast, the government can only suggest that the Mushroom Order prevents objecting producers such as respondent from "free riding" on the advertising of competitors. Not only is that factual assertion incorrect given the unique characteristics of the mushroom marketplace, see *supra* at 16-19, but as a legal matter it is merely a restatement of the fact that the mushroom assessment is singularly designed to enhance the speech of certain producers while shifting the ensuing costs to others. Such a program triggers the protections of the First Amendment.

The government nonetheless maintains (Br. 27) that whatever supply controls may be authorized by the AMAA, many of those controls were not included in the specific tree-fruit marketing orders at issue in *Wileman*. But in answering the question of how to characterize marketing orders, *Wileman* adopted the government's view (which it now disavows without so much as a side-long glance) that the relevant point of

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full production (typically seven years), considerably more trees may have been planted than the market can support. In times of substantial oversupply, which are sustained because growers continue producing because most of their costs already have been sunk, prices may fall for considerable periods. See J.A. 190, 198.

inquiry is the statutory scheme under which the orders are authorized. See *supra* at 21-22. Congress determined beginning in the 1930s that various commodity markets require stabilization, and provided the Secretary with discretion to determine which specific economic controls to adopt for each commodity. For some but not all commodities, the tools at the Secretary's disposal have since been expanded to include paid advertising. *Wileman* concluded that, in this context, all of the activities authorized by the AMAA were properly regarded as "economic regulations." The Solicitor General's quarrel with that conclusion is simply a challenge to the line drawn at the government's urging by *Wileman* itself; it is not a basis for sustaining an exaction for advertising in the very different context of the Mushroom Order.

Just as important, the marketing orders addressed in *Wileman* did, in fact, include important supply-side controls on California tree fruit that are not present under the Mushroom Order. According to the U.S.D.A., Marketing Order 916 (governing California nectarines) "authorizes grade, size, quality, and maturity regulations. It also sets container size, capacity, weight, dimension, and marking requirements. Minimum size requirements are specified for most varieties * * *. Container and pack requirements are also in effect." U.S.D.A., Agric. Mktg. Serv., *Summaries of Fruit and Vegetable Marketing Order and Agreement Programs*, <<*www.ams.usda.gov/fv/mosummary.htm*>> (visited Feb. 18, 2001). See also *id.* (Marketing Order 917 (governing California peaches) "authorizes grade, size, container, and pack requirements"). The Mushroom Order, by contrast, authorizes the Council to propose only "*voluntary* quality and grade standards for mushrooms" (which it has not done, in any event) and no restrictions at all on marketing containers. 7 C.F.R. § 1209.38.

Contrary to the assertion of the Solicitor General (Br. 27-28), regulations of grades and containers manifestly do restrict "supply" – their very purpose is to prohibit the market-

ing of noncompliant crops and to ensure uniform marketing. As explained in the Department of Agriculture's publication entitled *Federal Marketing Orders* (*available at* <<*www.ams.usda.gov*>>), "Regulating the quality of commodities to be shipped helps to keep inferior products from depressing the market for the whole crop, contributes to consumer satisfaction, and builds demand." In addition, as noted above, restrictions on commodity size, grade, and containers also have the effect of homogenizing the subject varieties of fruit. In other words, the orders' market-stabilization measures preclude, or at least substantially interfere with, individual producers' attempts to distinguish their products on a branded basis.

C. The Government's Attempt To Extend *Wileman* To Encompass All Exactions For "Non-Ideological" Promotional Programs Conflicts With The First Amendment Under This Court's Precedents.

1. Implicitly recognizing the substantial differences between AMAA marketing orders and research and promotion programs, the Solicitor General places considerable weight on the assertion that all compelled assessments for all "non-ideological" activities, including promotional advertising, are *per se* constitutional. See U.S. Br. 16 n.9, 30. From the outset, that contention is self-evidently implausible. If true, the federal and state governments would have carte blanche to compel individuals to finance, for example, performance art or cubist paintings that they find highly objectionable simply because the art in question is generally deemed "non-ideological." In the commercial area alone, objecting businesses could be forced to fund advertising supporting unionization drives; unions could be forced to advertise in support of decertification; and businesses could be required to finance their competitors' promotions – all without raising *any question* under the First Amendment. Not surprisingly, such an absurd suggestion has been soundly rejected by this Court's precedents.

A line of decisions beginning with *Abood* (431 U.S. 209 (1977)) holds that the First Amendment permits the government to compel dissenting employees to pay an "agency fee" equivalent to the costs of union representation. See also, *e.g.*, *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991). In so holding, the Court recognized that compelled contributions for collective bargaining activities implicate employees' associational and speech interests under the First Amendment. Dissenting employees, the Court first held in *Abood*, have a First Amendment right to "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." 431 U.S. at 234. The Court found the assessments justified, however, by "the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress" because failure to require contributions would engender "free riding" that would put at risk the collective effort. *Abood*, 431 U.S. at 222-24. The Court has balanced the competing First Amendment and governmental interests by requiring that the compelled contributions be either (i) used for activities "germane" to the collective effort (see *Lehnert*, 500 U.S. at 527-28), or (ii) (in the context of universities' efforts to foster a diversity of viewpoints) allocated to recipients on a "viewpoint neutral" basis (see *Board of Regents* v. *Southworth*, 529 U.S. 217, 232 (2000)).

As the excerpt quoted above reflects, *Abood* itself involved objections to non-germane expenditures that were "political." *Wileman*, in turn, noted the context of *Abood*, see 521 U.S. at 473, but (contrary to the Solicitor General's argument in this case) did not hold all exactions for non-ideological activities *per se* constitutional. To the contrary, *Wileman* reiterated the holding of *Lehnert*, in which eight members of the Court (all but Justice Marshall) agreed with the plaintiffs that a union could not, consistent with the First Amendment, exact fees to finance a non-ideological publication not germane to Congress' design in mandating associa-

tion to preserve labor peace. See 500 U.S. at 527-28 (plurality opinion); *id.* at 558-60 (Scalia, J., concurring). As the plurality explained, the Court has "consistently" required that even "*nonideological* expenses [be] germane to collective bargaining." *Id.* at 522 (citation omitted).[27] *Wileman*, in turn, recounted that *Lehnert* had applied *Abood* to hold "that the cost of certain publications that were not germane to collective-bargaining activities could *not* be assessed against dissenting union members." 521 U.S. at 473 (emphasis added).

Despite the fact that *Wileman* thus could not have broadly immunized all non-ideological assessments from First Amendment scrutiny, the Solicitor General argues the contrary based on a single sentence in the paragraph that follows *Wileman*'s discussion of *Lehnert*. See U.S. Br. 16 (emphasizing *Wileman*'s statement that "*in any event*, the assessments are not used to fund ideological activities" (emphasis added)). Not only would any such statement in *Wileman* be dictum (because the question was not remotely presented in that case), but the sentence in question simply distinguishes the specific holdings of *Abood* and *Keller*, as is plain when it is read in context.[28]

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[27] The government admitted as much in *Wileman*. See Br. of U.S., No. 95-1184, at 22-23 ("Otherwise stated, unions may utilize the dues of dissenting employees for expressive activities, so long as those activities are germane to the unions' statutory role under the labor laws.").

[28] The Court explained:

> As we pointed out in *Keller*, "*Abood* held that a union could not expend a dissenting individual's dues for ideological activities not 'germane' to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund

2. If there were any doubt that the *Abood* principle extends to non-ideological activities, it was put to rest in two post-*Wileman* decisions. *Air Line Pilots Ass'n* v. *Miller*, 523 U.S. 866 (1998), held that non-union members who have not agreed to arbitration procedures may raise agency-fee objections directly in court. The Court relied substantially on employees' First Amendment interest in not being compelled to finance objectionable union activities, a category in no way restricted to "ideological" activities:

> agency fees assessed by public-employee unions "must (1) be 'germane' to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop."

523 U.S. at 874 (quoting *Lehnert*, 500 U.S. at 519).

Subsequently, *Board of Regents* v. *Southworth*, 529 U.S. 217 (2000), held that students at public universities have a First Amendment interest in not paying fees to finance speech by organizations to which they object, including organizations

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> activities of an ideological nature which fall outside of those areas of activities." 496 U.S. 1 at 13-14. *This test* is clearly satisfied in this case because (1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders, and (2) in any event, the assessments are not used to fund ideological activities.

521 U.S. at 473 (emphasis added). The government's argument (Br. 16 n.9, 30) that this passage from *Wileman* establishes a disjunctive test – immunizing from First Amendment scrutiny assessments for activities that are *either* germane *or* non-ideological – is implausible as well. On that view, the First Amendment would not be implicated at all if the government required a group to finance ideological "Buy American" advertising programs germane to an effort to support American industries, or forced another group to finance ideological advertisements urging support for Democrats or Republicans germane to an effort to promote stability of the two-party system.

that do not engage in political or ideological activities.[29] Particularly relevant here, the Court explained:

> The proposition that students who attend the University cannot be required to pay subsidies for the speech of other students without some First Amendment protection follows from the *Abood* and *Keller* cases. * * * It infringes on the speech and beliefs of the individual to be required, by this mandatory student activity fee program, to pay subsidies for the objectionable speech of others without any recognition of the State's corresponding duty to him.

Id. at 232. See also *id.* at 223 (funding included "Future Financial Gurus of America").[30]

3. The Solicitor General's argument that all non-ideological assessments are immune from First Amendment scrutiny conflicts not only with *Abood* and its progeny, but also with this Court's commercial speech jurisprudence. The government presumably concedes, as it must, that a compelled assessment to fund ideological advertising would trigger First Amendment scrutiny. But see *supra* at 35-36 n.28 (discussing the government's apparent position that *all* germane activities are *per se* constitutional, even if used to fund solely ideological speech). This case, of course, involves not a

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[29] Of note, three members of the *Wileman* majority – Justices O'Connor, Kennedy, and Ginsburg – joined the Court's opinions in both *Southworth* (per Kennedy, J.) and *Miller* (per Ginsburg, J.).

[30] Rather than importing the "germaneness" test of *Abood*, the Court in *Southworth* ultimately held that the student fees must be apportioned on a viewpoint-neutral basis in light of the unique context of "the public university setting" in which "the State undertakes to stimulate the whole universe of speech and ideas." 529 U.S. at 232. No parallel concerns regarding application of the "germaneness" test are present in this case, where there is no governmental program to which the assessment could even arguably be germane, and where there is no possible argument that *all* speech would be "germane."

political or ideological message but a commercial one, which could conceivably trigger a lesser degree of First Amendment scrutiny under *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 447 U.S. 557 (1980). See also, *e.g.*, *44 Liquormart* v. *Rhode Island*, 517 U.S. 484 (1996). But see *City of Cincinnati* v. *Discovery Network*, 507 U.S. 410 (1993). But the basic principle is the same: United Foods has a First Amendment interest *of some degree* in not associating with, or fostering, a message with which it disagrees, no matter whether the message is ideological or instead purely commercial. See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976) (decisively rejecting the conclusion that commercial speech "is wholly outside the protection of the First Amendment"). The government's position that assessments for non-ideological purposes are *per se* valid as "economic regulations" without further inquiry is therefore insupportable.[31]

Indeed, this case directly implicates the concerns that led this Court to reverse course in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), and assign First Amendment value to commercial speech. Because "[i]t is a matter of public interest that [private economic] decisions, in the aggregate, be intelligent and well informed," "the free flow of commercial information is indispensable." 425 U.S. at 765. The singular design of the

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[31] Nor is United Foods' First Amendment interest diluted significantly by the fact that respondent has been compelled to finance advertising rather than required to speak directly. See *Buckley* v. *Valeo*, 424 U.S. 1, 16 (1976) ("[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment."). Indeed, *Virginia State Board*, *Central Hudson*, and *44 Liquormart*, to name just a few examples, all involved paid advertising. Cf. *Buckley* v. *American Constitutional Law Found.*, 525 U.S. 182 (1999) (invalidating restriction on paid petition circulators).

Mushroom Order, by contrast, is to tip the scales in favor of a commercial message – generic advertising favoring small producers – that would not otherwise prevail. That the specific message financed by United Foods' contributions is selected by respondent's *competitors* makes the assessment all the more inimical to First Amendments values. Cf. *44 Liquormart*, 517 U.S. at 501 (plurality opinion of Stevens, Kennedy, and Ginsburg, JJ.) (when regulation of commercial speech is not based on "preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands").[32]

IV. The Mushroom Assessment Is Not Immune From Scrutiny As "Government Speech."

The "government speech" defense raised by the Solicitor General is not properly presented because it was not "pressed in" or "passed on by" either of the lower courts, nor is it fairly included within the question presented. Furthermore, even if the Mushroom Council engages in "government speech," that fact does not defeat United Foods' First Amendment claim, which is directed at the compulsion of being required to support and associate with the Council's message. In any event, the Council's operations and promotional activities are overwhelmingly private, not governmental, and therefore cannot fairly be said to constitute "government speech."

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[32] As the foregoing makes clear, respondent's view is that the Sixth Circuit's judgment can and should be affirmed on the basis of *Wileman*. That said, a number of the government's arguments – particularly its contention that, contrary to the Court's understanding in *Wileman*, advertising assessments are not integrally related to non-speech-related aspects of marketing orders – suggest that it would be appropriate to reconsider *Wileman*. To the extent the Court elects to do so, respondent would of course prevail on that basis as well.

A. No Question Of "Government" Speech Is Properly Presented In This Case.

The Solicitor General's concession that "[t]he argument that the generic advertising program for mushrooms is permissible government speech [was] not raised or addressed below" (Br. 32 n.19) should be the end of the matter. Whether the issue is fairly included within the question presented or not is beside the point: this Court "may address a question properly presented in a petition for certiorari *if* it was 'pressed [in] or passed on' by the Court of Appeals." *United States* v. *Wells*, 519 U.S. 482, 488 (1997) (quoting *United States* v. *Williams*, 504 U.S. 36, 42 (1992)) (emphasis added). See also *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 33 n.7 (1993) (describing the "prudential rule [that] precludes our review of an issue that 'was not pressed or passed upon below'").[33]

Furthermore, the government speech argument is not "fairly included" within the Court's grant of certiorari. Although the issue may "literally" fall within the question presented, which asserts that the mushroom assessment does not "violate the First Amendment" (Pet. i), the same would be true if the question had broadly asserted that "the Sixth Circuit erred." The relevant point is that neither the certiorari

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[33] The government's reliance (Br. 32 n.19) on *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995), in which the question whether Amtrak was a state actor "was addressed by the court below" (*id.* at 379), is therefore misplaced. Moreover, as the *Lebron* majority emphasized, the state action theory was "closely related" to, and indeed had to be resolved "prior to," the argument raised in the petition for certiorari. *Id.* at 381-82. Here, by contrast, the government seeks to raise an issue that, as the Solicitor General admits (Br. 13, 32), is entirely "independent of" the arguments raised and addressed below. Indeed, the government's argument that the mushroom assessment finances government "speech" is in considerable tension with the *Wileman*-based argument that the assessment merely constitutes "economic regulation."

petition nor the decision of the court of appeals adverts to this issue directly or even obliquely.[34] To the contrary, the petition principally relies on *Wileman* (in which the government *disavowed* the government speech theory (see 521 U.S. at 482 n.2 (Souter, J., dissenting))) and asserts that the decision below conflicts with *United States* v. *Frame*, 885 F.2d 1119 (CA3 1989), *cert. denied*, 493 U.S. 1094 (1990) (which *rejected* the government speech theory in the context of the assessment for beef). See Pet. 8-11; cf. *Lebron*, 513 U.S. at 380-81 (petition's discussion of circuit conflict relevant to scope of question presented). The court of appeals decision is similarly limited to an analysis of *Wileman*.

Adherence to this Court's firm practice of reaching only those questions that are properly presented is particularly appropriate in this case. As the Court has recently reiterated, the determination whether the Mushroom Council is a governmental entity would be a "'necessarily fact-bound inquiry.'" *Brentwood Acad.* v. *Tennessee Sec. Sch. Athl. Ass'n*, No. 99-901, slip op. at 9 (Feb. 20, 2001) (quoting *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 935 (1982)). Factors such as the degree of federal oversight of the Council's operations, the independence of the Mushroom Council's private members in shaping advertising programs, and whether and to what extent the advertising is issued in the name of a private, rather than governmental, entity would all be relevant. But because petitioners never raised a government speech defense in the lower courts, no record was developed on any of those points.[35] At bottom, the government seeks advantage in its

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[34] The petition did not even reproduce as "relevant" several of the statutory provisions on which the "government speech" argument assertedly rests. Compare U.S. Br. pt. II (citing 7 U.S.C. § 7401(a)(10), (b)(8), (b)(11)) with Pet. 24a-28a (not reproducing those provisions).

[35] Indeed, based on the government's objection, the administrative law judge rejected United Foods' request to have a developed record from a parallel administrative challenge to the mushroom assessment adopted in this case. See Order Granting Motion To Stay Pro-

own default by attempting to circumvent respondent's right to discovery on a fundamentally fact-bound defense.[36] The Court accordingly should not reach the merits of the government speech argument in this case.

If the Court does reach the issue, it should hold (for the reasons addressed in the next sections) that the mushroom assessment is not immune from First Amendment scrutiny as "government speech."

B. The Government's Argument Misapprehends The Nature Of Respondent's Claim.

When the government *itself* speaks (whether through its officials or through the expenditure of public funds) it has the broad power to determine what message and viewpoint it will convey. See *Legal Servs. Corp.* v. *Velazquez*, No. 99-603, slip op. at 6-7 (Feb. 28, 2001). That conclusion follows from the broader principle that the government generally may expend funds through "speech and other expression to advocate

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ceedings, No. 96-1252, *United States* v. *United Foods*, at 4 (W.D. Tenn. Feb. 11, 1997).

[36] An example illustrates the danger of this Court attempting to address this defense based on unsupported assertions or anecdotal evidence regarding the Mushroom Order's functioning. The government advised this Court in its opening brief (Br. 41-42 & n.27) that the Order includes "political controls" that "provide meaningful relief" because producers may terminate the mushroom program through a referendum vote. In support of that statement, the Solicitor General explained that "the generic advertising program for pork was to be discontinued by the Secretary of Agriculture after a referendum in which a majority of park producers voted against the program," citing not the record in this case but instead an article in the *Washington Post*. *Id.* 42 n.27 (quoting William Claiborne, *Hog Producers Defeat "Pork Checkoff*," WASH. POST., Jan. 16, 2001, at A2). That turned out to be inaccurate. The U.S.D.A. subsequently "reversed a decision by the Clinton administration to honor the [referendum]," having negotiated changes in the program with a subset of producers. William Claiborne, *Hog Farmers Vow To Sue USDA – Reversal On Vote Against Promotion Fee Stirs Anger*, WASH. POST, Mar. 2, 2001, at A7, 2001.

and defend its own policies." *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

That rationale is simply inapplicable to the First Amendment claim in this case. It is common ground that the government speech doctrine could be advanced to oppose a claim brought by a member of the Mushroom Council that the Mushroom Order constitutes viewpoint discrimination – for example, by limiting negative statements about other commodities, see 7 C.F.R. § 1209.40(d). It is also common ground that, under the government speech doctrine, the federal government could, without raising a First Amendment concern, create, staff, and finance through general tax revenues a public body to engage in generic mushroom promotion. Indeed, the government likely could fund this very program if funded through *voluntary* contributions. See 7 C.F.R. § 1209.50(d) (Council may accept voluntary contributions).

Respondent's claim is very different. United Foods complains that the federal government is compelling *it* to support – effectively to finance and associate with – the Mushroom Council's speech activities. Unlike an allegation that the government is engaging in viewpoint discrimination in expending its own resources, respondent's claim is one both of compelled speech and of compelled association.[37] On the So-

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[37] Respondent's claim is not undermined by the fact that it is compelled to associate only for the purpose of speech rather than a broader array of collective activities. To the contrary, the fact that the Mushroom Order involves virtually no non-speech-related activities establishes that it must be scrutinized as a regulation of speech. *E.g.*, *Lehnert*, 500 U.S. at 522 (plurality) ("The burden on freedom of expression is particularly great where, as here, the compelled speech is in a public context."); *id.* at 560 (Scalia, J., concurring) (if a "newsletter [funded by compelled assessments] is inherently communicative," the fact that it "communicates * * * 'for the benefit of all' does not lessen the First Amendment injury to those who do not agree" (citation omitted)); *Ellis* v. *Brotherhood of Ry., Airline & Steamship Clerks*, 466

licitor General's view that the "government speech" doctrine automatically defeats all such claims, it is difficult to understand why the government would not have carte blanche to compel, without any First Amendment inquiry at all, the nation's 300 leading competitive runners to pay a special assessment to finance a costly scheme by the Surgeon General to advertise jogging's benefits to health and sexual vitality – akin to the Mushroom Council's suggestion that mushrooms are an aphrodisiac – on billboards, on television, in skywriting, and perhaps even on every pair of running shorts.

Furthermore, unlike instances in which a complaining party voluntarily associates itself with a governmental program or is subject to broad economic regulation that always compels association to some degree, the federal government compels United Foods to associate with other producers for the singular purpose of financing speech to which it objects.[38] Such a program requires First Amendment scrutiny, which it concededly cannot survive. As the Third Circuit reasoned in rejecting the invocation of the government speech doctrine with regard to the beef assessment:

U.S. 435, 456 (1984) ("The First Amendment concerns with regard to publications and conventions are more serious; both have direct communicative content and involve the expression of ideas."). In point of fact, the First Amendment interest in this case is substantially greater than in *Abood* and its progeny because the generic promotions funded by the mushroom assessment directly undermine United Foods' constitutionally protected commercial promotions of its Pictsweet brand.

[38] Compare, *e.g.*, *Legal Servs. Corp.* v. *Velazquez*, No. 99-603 (Feb. 28, 2001) (clients voluntarily associate themselves with legal services program); *Wileman*, 521 U.S. 457 (heavy regulation of industry marketing); *Southworth*, 529 U.S. 217 (students voluntarily attend university); *Rust* v. *Sullivan*, 500 U.S. 173 (1991) (doctors voluntarily associate themselves with Title X program); *Abood*, 431 U.S. 209 (employees voluntarily associate themselves with agency-shop employer).

> Both the right to be free from compelled expressive association and the right to be free from compelled affirmation of belief presuppose a coerced nexus between the individual and the specific expressive activity. When the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated. See *Wooley* v. *Maynard*, 430 U.S. at 721 (Rehnquist, J., dissenting). In contrast, where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes.

Frame, 885 F.2d at 1132.[39]

C. The Mushroom Assessment Is Not Properly Immunized From First Amendment Scrutiny As Government Speech.

In any event, on a proper understanding, the Mushroom Council's activities are private rather than governmental speech; the fact that contributions are exacted under the authority of the U.S.D.A. (see U.S. Br. 38-39) only means that there is sufficient state action to trigger the First Amendment. As in *Southworth*, the speech in this case "springs from the

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[39] It is no answer, of course, that observers – *e.g.*, those who read the Mushroom Council's promotions – may be unaware of the compelled association or, if aware, may not regard United Foods as endorsing the Council's activities because the assessment is avowedly involuntary. The right of association, encompassing as it does a freedom of belief and a right *not* to associate, has never turned on how "obvious" the compelled association was. Cf. *Wooley* v. *Maynard*, 430 U.S. 705 (1977) (unconstitutional to compel display of state motto on license plate, notwithstanding that motto was obviously statement of the state rather than the driver); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943) (unconstitutional to compel flag salute, notwithstanding that act might be obviously involuntary).

initiative" of private parties who "give it purpose and content." 529 U.S. at 229.

1. The Council's Promotional Activities Are Private, Not Governmental. The Mushroom Council cannot fairly be described as a governmental entity. Unlike a case such as *Brentwood*, slip op. at 12 n.4, "public officials" do *not* "control operation" of the Council. An industry referendum not only created the program but could terminate it as well, even over the Secretary of Agriculture's objection. 7 C.F.R. §§ 1209.71(3), .300 *et seq*. Mushroom producers and importers both nominate and constitute the membership of the Mushroom Council. *Id.* §§ 1209.31, .32. No government officials sit on the Council, and the Secretary's power to control its membership is limited to the formal act of appointment or the power of removal in exceptional circumstances. *Id.* §§ 1209.33, .35(c). Funding for the Council's activities comes entirely from assessments on mushroom producers and importers, not tax revenues or even "user fees" used to finance a variety of activities. *Id.* §§ 1209.50, .51.[40] The Council also uses assessed funds to reimburse the federal government for any costs it incurs with respect to the program. See U.S.D.A., Agric. Mktg. Serv., *Mushroom Promotion, Research, and Consumer Information Order*, *supra*.

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[40] The cases cited by the government (Br. 42-43 n.28) involving "user fees" did not address any First Amendment question and accordingly are inapposite. The Solicitor General's further reliance (*id.* 43) on *Southworth*'s statement that funds from "tuition dollars" could support government speech misunderstands that decision, which in reality seriously undermines petitioners' position. The *Southworth* majority described student fees, which are targeted to funding of private speech by student organizations, as incompatible with a "government speech" analysis, in contrast to general tuition dollars, which finance all of the university's educational endeavors. 529 U.S. at 229. The assessment in this case, which is targeted to financing mushroom advertising, is far more analogous to the former.

The Council's promotional activities also further a private, not governmental, interest. As in *Legal Services Corp.* (slip op. at 7), this program "was designed to facilitate private speech, not to promote a governmental message." The Council's private membership is solely responsible for creating a budget, as well as (particularly relevant here) designing and implementing all of the promotional programs; the Secretary of Agriculture has no such power. 7 C.F.R. §§ 1209.40, .50.

The Council furthermore may engage only in activities related to the research and promotion of mushrooms – any other activities of a governmental or quasi-governmental nature either are outside the bounds of its authority or are expressly forbidden. In particular, in direct contrast to what would be regarded as the paradigmatic governmental activity of seeking policy changes, the Council's funds may not "in any manner be used for the purpose of influencing legislation or governmental policy or action" other than suggesting amendments to the Mushroom Order and proposing possible "voluntary grade and quality standards for mushrooms." 7 C.F.R. § 1209.53.

The Council furthermore represents itself, and particularly its promotional activities, as private rather than governmental. Thus, press accounts of promotional activities by the Council over the past year variously describe it as "a trade association representing mushroom growers," "a promotional organization," "an organization that promotes the use of cultivated mushrooms," and "a mushroom growers trade group." Linda Giuca, *Flourishing Fungi*, HARTFORD COURANT, Jan. 31, 2001, at G1; Melissa Clark, *Food Chain*, N.Y. TIMES, Nov. 1, 2000, at F12; Teresa J. Farney, *Specialty Mushrooms Take Center Stage*, CINCI. ENQUIRER, June 4, 2000, at H3; Noi Mahoney, *AACC Creating Frugal Kitchens*, CAPITAL (ANNAP.), Apr. 18, 2000, at B1.[41] Nor does the Council's princi-

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[41] The Council's advertisements themselves are not compiled in the record.

pal promotional venture, <<*www.mushroomcouncil.com*>>, suggest that it promulgates a governmental message.

The Solicitor General argues to the contrary (Br. 37-40) based principally on the "findings" of the Mushroom Act and the FAIR Act that Congress seeks through commodity promotion programs to further the interests of producers. But that is no more than the assertion that *every* congressional enactment, each one of which seeks to further some interest, is "governmental" rather than "private." The more salient point – which is entirely consistent with the congressional findings – is that the Act seeks to achieve this result through promotional advertising funded, designed, and administered by the industry participants for their own benefit. There is no serious argument that such activities have traditionally been undertaken by the government. Moreover, it is apparent that the "findings" were drafted specifically in order to circumvent judicial scrutiny of commodity promotion programs. See 142 Cong. Rec. S3070 (daily ed. Mar. 28, 1996) (Sen. Feingold) (FAIR Act findings "are not indicative of the views of more than a handful of farm bill conferees," but rather were added by the staff of the conference committee to preempt "the first amendment challenges to these programs"; describing manipulation of legislative process as "shameful" and "irresponsible"); cf. *Brentwood*, slip op. at 11 ("the time is long past when" the degree of governmental involvement that would lead to First Amendment liability was "attested frankly").

2. The Secretary of Agriculture's Oversight Role Is Minimal. The Solicitor General's principal argument in support of the "government speech" theory is that the Secretary of Agriculture has oversight authority over the Council's decisions. There is no record support for that claim. See *supra* at 41-42. Furthermore, all of the publicly available materials establish the contrary. As the General Accounting Office has explained, U.S.D.A. views its role as simply "ensuring compliance with the authorizing legislation and the agency's related orders." G.A.O., *Agricultural Marketing: Comparative*

Analysis of U.S. and Foreign Promotion and Research Programs 3 (1995). U.S.D.A.'s "Guidelines for AMS [Agricultural Marketing Service] Oversight of Commodity Research and Promotion Programs" state that AMS will only review submitted materials to ensure that they "are in compliance with the applicable legislative authority." 64 Fed. Reg. 70682, 70686 (1999). The only substantive check imposed by the U.S.D.A. is that promotional programs may not be "disparaging to another commodity or false and misleading," or "derogatory to individuals with respect to ethnicity, gender, race, physical abilities, or religion." *Id.*

Moreover, U.S.D.A. "is *not* responsible for evaluating program effectiveness; that responsibility is left to the individual [commodity] boards." G.A.O., *Agricultural Marketing: Federally Authorized Commodity Research and Promotion Programs* 2 (1993) (emphasis added). To the extent that the U.S.D.A.'s Inspector General uncovers problems with the programs, "AMS reports the OIG's findings to the boards and relies on the boards to correct any problems identified." *Id.* at 7. Indeed, U.S.D.A. "think[s] it is *important* that the industry themselves make the determination of how these programs operate" and therefore limits itself to determining that "the industry stays within the enabling legislation." Testimony of Lon Hatamiya, Admin'r of A.M.S., *Review of the National Soybean Checkoff Program*, Hrg. Before the Subcomm. on General Farm Commodities of the House Comm. on Agric., 104th Cong., 2d Sess. 10 (July 31, 1996) (emphasis added). As a result, "[b]eyond establishing the legal framework for operations and setting certain informational standards, federal input into program operations has been minimal." Ronald W. Ward, *supra*, at 35. See also Charles D. Lambert, *An Analytical Framework for Policy Issues: Response*, *in* COMMODITY PROMOTION POLICY IN A GLOBAL ECONOMY, *supra*, at 105, 112 ("Government's role is simply to see that the programs are collected uniformly and administered according to the legislation that established the checkoff programs.").

Limited federal involvement reflects the design of Congress, which regards research and promotion programs including the Mushroom Act as "designed and implemented by the producers themselves." *Mushroom Act Hearings*, *supra*, at 81 (Rep. Emerson). As the Congressional Report on the various research and promotion programs enacted by Congress in 1990 explains in the very first sentence on the Mushroom Act, the statute was intended to "enable producers of fresh mushrooms to develop, finance, and carry out" the program. *Mushroom Act Report*, *supra*, at 44. The Mushroom Act is thus nothing more than, as is stated in its text, a "self-help" measure enforced through the threat of federal sanction. 7 U.S.C. § 7401(b).[42]

The fact that there is no ongoing federal oversight of these programs also serves to illustrate that the Mushroom Order lacks the "political controls" that ameliorate First Amendment concerns, *Legal Servs. Corp.*, slip op. at 7, found in "government speech" cases. To the contrary, the determination whether the assessment shall be continued rests squarely in the hands of a majority of United Foods' competitors. The Bill of Rights was intended in large part, of course, precisely to serve as a check against the untrammeled will of the majority.

The "government speech" doctrine, even if properly presented in this case, accordingly does not immunize the Mushroom Council's activities from First Amendment scrutiny.

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[42] Supporters of the omnibus statute that included the Mushroom Act similarly explained that it would "not add to the Federal bureaucracy. All we are doing is allowing these commodity groups to establish and administer their own research and marketing programs, to develop uses and find customers for their products." 135 Cong. Rec. S15068 (daily ed. Nov. 6, 1989) (Sen. Fowler). They specifically recognized that, "[w]hile the Department of Agriculture would provide oversight and ensure compliance, the checkoff program would be run by producers at the State and national level." 136 Cong. Rec. S10708 (daily ed. July 26, 1990) (Sen. Cochran).

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

Provisions of the Mushroom Act, 7 U.S.C. § 6101 *et seq.*:

§ 6104. Required terms in orders

(a) In general. Each order issued under this subtitle shall contain the terms and conditions prescribed in this section.

(b) Mushroom Council.

(1) Establishment and membership of Council.

(A) Establishment. The order shall provide for the establishment of, and selection of members to, a Mushroom Council that shall consist of at least 4 members and not more than 9 members.

(B) Membership. Except as provided for in paragraph (2), the members of the Council shall be mushroom producers and importers appointed by the Secretary from nominations submitted by producers and importers in the manner authorized by the Secretary, except that no more than one member may be appointed to the Council from nominations submitted by any one producers or importer.

(2) Appointments.

(A) In general. In making appointments, the Secretary shall take into account, to the extent practicable, the geographical distribution of mushroom production throughout the United States, and the comparative volume of mushrooms imported into the United States.

(B) Units. In establishing such geographical distribution of mushroom production, a whole State shall be considered as a unit and such units shall be organized into 4 regions that shall fairly represent the geographic distribution of mushroom production within the United States.

(C) Importers. Importers shall be represented as one region, which shall be separate from the regions established for mushrooms produced in the United States.

(D) Members per region. The Secretary shall appoint one member from each region if such region produces or imports, on average, at least 35,000,000 pounds of mushrooms annually.

(E) Additional members. Subject to the nine-member limit on the number of members on the Council provided in paragraph (1), the Secretary shall appoint an additional member to the Council from a region for each additional 50,000,000 pounds of production or imports per year, on average, within the region.

(F) For purposes of this paragraph, in determining average annual mushroom production in each of the 4 regions of the United States established under this paragraph, the Secretary shall only consider mushrooms produced by producers covered by this subtitle, as defined in section 1923(11) [*7 USCS § 6102*(11)].

(G) Failure to nominate. If producers and importers fail to nominate individuals for appointment, the Secretary may appoint members on a basis provided for in the order.

(3) Terms; compensation.

(A) Terms. The term of appointment to the Council shall be for 3 years, except that the initial appointments shall to the extent practicable be proportionately for 1-year, 2-year, and 3-year terms.

(B) Compensation. Council members shall serve without compensation but shall be reimbursed for their expenses incurred in performing their duties as members of the Council.

(c) Powers and duties of the Council. The order shall define the powers and duties of the Council, which shall include the following powers and duties--

(1) to administer the order in accordance with its terms and provisions;

(2) to make rules and regulations to effectuate the terms and provisions of the order;

(3) to appoint members of the Council to serve on an executive committee;

(4) to propose, receive, evaluate, approve and submit to the Secretary for approval under subsection (d) budgets, plans, and projects of mushroom promotion, research, consumer information, and industry information, as well as to contract and enter into agreements with appropriate persons to implement such plans or projects;

(5) to develop and propose to the Secretary voluntary quality and grade standards for mushrooms;

(6) to receive, investigate, and report to the Secretary complaints of violations of the order;

(7) to recommend to the Secretary amendments to the order; and

(8) to invest, pending disbursement under a plan or project, funds collected through assessments authorized under this subtitle only in--

(A) obligations of the United States or any agency thereof;

(B) general obligations of any State or any political subdivision thereof;

(C) any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System; or

(D) obligations fully guaranteed as to principal and interest by the United States,

except that income from any such invested funds may only be used for any purpose for which the invested funds may be used.

(d) Plans and budgets.

(1) Submission to Secretary. The order shall provide that the Council shall submit to the Secretary for approval any plan or project of promotion, research, consumer information, or industry information.

(2) Budgets. The order shall require the Council to submit to the Secretary for approval budgets on a fiscal year basis of its anticipated expenses and disbursements in the implementation of the order, including projected costs of promotion, re-

search, consumer information, and industry information plans and projects.

(3) Approval by Secretary. No plan or project of promotion, research, consumer information, or industry information, or budget, shall be implemented prior to its approval by the Secretary.

(e) Contracts and agreements.

(1) In general. To ensure efficient use of funds, the order shall provide that the Council may enter into contracts or agreements for the implementation and carrying out of plans or projects of mushroom promotion, research, consumer information, or industry information, including contracts with producer organizations, and for the payment of the cost thereof with funds received by the Council under the order.

(2) Requirements. Any such contract or agreement shall provide that--

(A) the contracting party shall develop and submit to the Council a plan or project together with a budget or budgets that shall show estimated costs to be incurred for such plan or project;

(B) the plan or project shall become effective on the approval of the Secretary; and

(C) the contracting party shall keep accurate records of all of its transactions, account for funds received and expended, make periodic reports to the Council of activities conducted, and make such other reports as the Council or the Secretary may require.

(3) Producer organizations. The order shall provide that the Council may contract with producer organizations for any other services. Any such contract shall include provisions comparable to those provided in subparagraphs (A), (B), and (C) of paragraph (2).

(f) Books and records of Council.

(1) In general. The order shall require the Council to--

(A) maintain such books and records (which shall be available to the Secretary for inspection and audit) as the Secretary may prescribe;

(B) prepare and submit to the Secretary, from time to time, such reports as the Secretary may prescribe; and

(C) account for the receipt and disbursement of all funds entrusted to the Council.

(2) Audits. The Council shall cause its books and records to be audited by an independent auditor at the end of each fiscal year, and a report of such audit to be submitted to the Secretary.

(g) Assessments.

(1) Collection and payment.

(A) In general. The order shall provide that each first handler of mushrooms for the domestic fresh market produced in the United States shall collect, in the manner prescribed by the order, assessments from producers and remit the assessments to the Council.

(B) Importers. The order also shall provide that each importer of mushrooms for the domestic fresh market shall pay assessments to the Council in the manner prescribed by the order.

(C) Direct marketing. Any person marketing mushrooms of that person's own production directly to consumers shall remit the assessments on such mushrooms directly to the Council in the manner prescribed in the order.

(2) Rate of assessment. The rate of assessment shall be determined and announced by the Council and may be changed by the Council at any time. The order shall provide that the rate of assessment--

(A) for the first year of the order, may not exceed one-quarter cent per pound of mushroom;

(B) for the second year of the order, may not exceed one-third cent per pound of mushroom;

(C) for the third year of the order, may not exceed one-half cent per pound of mushroom; and

(D) for the following years of the order, may not exceed one cent per pound of mushrooms.

(3) Use of assessments. The order shall provide that the assessments shall be used for payment of the expenses in implementing and administering this subtitle, with provision for a reasonable reserve, and to cover those administrative costs incurred by the Secretary in implementing and administering this subtitle, except for the salaries of Government employees incurred in conducting referenda.

(4) Limitation on collection. No assessment may be collected on mushrooms that a first handler certifies will be exported as mushrooms.

(h) Prohibition. The order shall prohit any funds received by the Council under the order from being used in any manner for the purpose of influencing legislation or governmental action or policy, except that such funds may be used by the Council for the development and recommendation to the Secretary of amendments to the order as prescribed in this subtitle and for the submission to the Secretary of recommended voluntary grade and quality standards for mushrooms under the Agricultural Marketing Act of 1946 *(7 U.S.C. 1621* et seq.).

(i) Books and records.

(1) In general. The order shall require that each first handler and importer of mushrooms maintain, and make available for inspection, such books and records as may be required by the order and file reports at the time, in the manner, and having the content prescribed by the order.

(2) Availability to Secretary. Such information shall be made available to the Secretary as is appropriate for the administration or enforcement of this subtitle, the order, or any regulation issued under this subtitle.

(3) Confidentiality.

(A) In general. Except as otherwise provided in this subtitle, all information obtained under paragraph (1) shall be kept

confidential by all officers and employees of the Department and the Council, and agents of the Council, and only such information so obtained as the Secretary considers relevant may be disclosed to the public by them and then only in a suit or administrative hearing brought at the request of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving the order.

(B) Limitations. Nothing in this paragraph may be construed to prohibit--

(i) the issuance of general statements, based on the reports, of the number of persons subject to the order or statistical data collected therefrom, which statements do not identify the information furnished by any person; or

(ii) the publication, by direction of the Secretary, of the name of any person violating the order, together with a statement of the particular provisions of the order violated by such person.

(4) Availability of information.

(A) In general. Except as otherwise provided in this subtitle, information obtained under this subtitle may be made available to another agency of the Federal Government for a civil or criminal law enforcement activity if the activity is authorized by law and if the head of the agency has made a written request to the Secretary specifying the particular information desired and the law enforcement activity for which the information is sought.

(B) Penalty. Any person knowingly violating this subsection, on conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for not more than 1 year, or both, and if an officer or employee of the Council or the Department, shall be removed from office.

(5) Withholding information. Nothing in this subtitle shall be construed to authorize the withholding of information from Congress.

(j) Other terms and conditions. The order also shall contain such terms and conditions, not inconsistent with this subtitle,

as are necessary to effectuate this subtitle, including provisions for the assessment of a penalty for each late payment of assessments under subsection (g).

* * * *

§ 6105. Referenda

(a) Initial referendum.

(1) In general. Within the 60-day period immediately preceding the effective date of an order issued under section 1924(b) [*7 USCS § 6103*(b)], the Secretary shall conduct a referendum among mushroom producers and importers to ascertain whether the order shall go into effect.

(2) Approval of order. The order shall become effective, as provided in section 1924(b) [*7 USCS § 6103*(b)], if the Secretary determines that the order has been approved by a majority of the producers and importers voting in the referendum, which majority, on average, annually produces and imports into the United States more then 50 percent of the mushrooms annually produced and imported by all those voting in the referendum.

(b) Succeeding referenda.

(1) Determination concerning order.

(A) In general. Effective 5 years after the date on which an order becomes effective under section 1924(b) [*7 USCS § 6103*(b)], the Secretary shall conduct a referendum among mushroom producers and importers to ascertain whether they favor continuation, termination or suspension of the order.

(B) Request for referendum. Effective beginning 3 years after the date on which an order becomes effective under section 1924(b) [*7 USCS § 1924*(b)], the Secretary, on request of a representative group comprising 30 percent or more of the number of mushroom producers and importers, may conduct a referendum to ascertain whether producers and importers favor termination or suspension of the order.

(2) Suspension or termination. If, as a result of any referendum conducted under paragraph (1), the Secretary determines that suspension or termination of an order is favored by a majority of the producers and importers voting in the referendum, which majority, on average, annually produces and imports into the United States more than 50 percent of the mushrooms annually produced and imported by all those voting in the referendum, the Secretary shall--

(A) within 6 months after making such determination, suspend or terminate, as appropriate, collection of assessments under the order; and

(B) suspend or terminate, as appropriate, activities under the order in an orderly manner as soon as practicable.

(c) Manner. Referenda conducted pursuant to this section shall be conducted in such a manner as is determined by the Secretary.

Provisions of the Mushroom Order, 7 C.F.R. Pt. 201:

§ 1209.11 Mushrooms.

Mushrooms means all varieties of cultivated mushrooms grown within the United States and marketed for the fresh market, or imported into the United States and marketed for the fresh market, except such term shall not include mushrooms that are commercially marinated, canned, frozen, cooked, blanched, dried, packaged in brine, or otherwise processed in such manner as the Council, with the approval of the Secretary, may determine.

* * * *

§ 1209.15 Producer.

Producer means any person engaged in the production of mushrooms who owns or shares the ownership and risk of loss of such mushrooms and who produces, on average, over 500,000 pounds of mushrooms per year.

* * * *

§ 1209.30 Establishment and membership.

(a) There is hereby established a Mushroom Council of not less than four or more than nine members. The Council shall be composed of producers appointed by the Secretary under § 1209.33, except that, as provided in paragraph (c), importers shall be appointed by the Secretary to the Council under § 1209.33 once imports, on average, reach at least 35,000,000 pounds of mushrooms annually.
* * * *

* * * *

§ 1209.31 Nominations.

All nominations for appointments to the Council under § 1209.33 shall be made as follows:

(a) As soon as practicable after this subpart becomes effective, nominations for appointment to the initial Council shall be obtained from producers by the Secretary. In any subsequent year in which an appointment to the Council is to be made, nominations for positions whose terms will expire at the end of that year shall be obtained from producers, and as appropriate, importers, and certified by the Council and submitted to the Secretary by August 1 of such year, or such other date as approved by the Secretary.

(b) Nominations shall be made at regional caucuses of producers or importers, or by mail ballot as provided in paragraph (e), in accordance with procedures prescribed in this section.

(c) Except for initial Council members, whose nomination process will be initiated by the Secretary, the Council shall issue a call for nominations by February 1 of each year in which nominations for an appointment to the Council is to be made. The call shall include, at a minimum, the following information:

(1) A list by region of the vacancies for which nominees may be submitted and qualifications as to producers and importers.

(2) The date by which the names of nominees shall be submitted to the Secretary for consideration to be in compliance with paragraph (a) of this section.

(3) A list of those States, by region, entitled to participate in the nomination process.

(4) The date, time, and location of any next scheduled meeting of the Council, and national and State producer or

importer associations, if known, and of the regional caucuses, if any.

(d)(1) Except as provided in paragraph (e), nominations for each position shall be made by regional caucus in the region entitled to nominate for such position. Notice of such caucus shall be publicized to all producers or importers within the region, and to the Secretary, at least 30 days prior to the caucus. The notice shall have attached to it the call for nominations from the Council and the Department's equal opportunity policy. Except with respect to nominations for the initial appointments to the Council, the responsibility for convening and publicizing the regional caucus shall be that of the Council.

(2) All producers or importers within the region may participate in the caucus. However, if a producer is engaged in the production of mushrooms in more than one region or is also an importer, such person's participation within a region shall be limited to one vote and shall only reflect the volume of such person's production or imports within the applicable region.

(3) The regional caucus shall conduct the selection process for the nominees in accordance with procedures to be adopted at the caucus subject to the following requirements:

(i) There shall be two individuals nominated for each open position.

(ii) Each nominee shall meet the qualifications set forth in the call.

(iii) If a producer nominee is engaged in the production of mushrooms in more than one region or is also an importer, such individual shall participate within the region that such individual so elects in writing to the Council and such election shall remain controlling until revoked in writing to the Council.

(e) After the regional caucuses for the initial Council, the Council may conduct the selection of nominees by mail ballot in lieu of a regional caucus.

(f) When producers or importers are voting for nominees to the Council, whether through a regional caucus or a mail ballot, the following conditions shall apply:

(1) Voting for any open position shall be on the basis of:

(i) one vote per eligible voter; and

(ii) volume of on-average production or imports of the eligible voter within that region.

(2) Whenever the producers or importers in a region are choosing nominees for one open position on the Council, the proposed nominee with the highest number of votes cast and the proposed nominee with the highest volume of production or importers voted shall be the nominees submitted to the Secretary. If a proposed nominee receives both the highest number of votes cast and the highest volume of production or imports voted, then the proposed nominee with the second highest number of votes cast shall be a nominee submitted to the Secretary along with such proposed nominee receiving both the highest number of votes cast and the highest volume of production or imports voted.

(3) Whenever the producers or importers in a region are choosing nominees for more than one open position on the Council at the same time, the number of the nominations submitted to the Secretary shall equal twice the number of such open positions, and for each open position shall consist of the proposed nominee with the highest number of votes cast and the proposed nominee with the highest volume of production or imports voted with respect to that position, subject to the rule set out in paragraph (f)(2). An individual shall only be nominated for one such open position.

(4) Voters shall certify on their ballots as to their on-average production or import volume within the region involved. Such certification may be subject to verification.

(g)(1) The Secretary may reject any nominee submitted. If there are insufficient nominees from which to appoint members to the Council as a result of the Secretary's rejecting such nominees, additional nominees shall be submitted to the Secretary under the procedures set out in this section.

(2) Whenever producers or importers in a region cannot agree on nominees for an open position on the Council under the preceding provisions of this section, or whenever they fail to nominate individuals for appointment to the Council, the Secretary may appoint members in such manner as the Secretary, by regulation, determines appropriate.

* * * *

§ 1209.33 Appointment.

From the nominations made pursuant to § 1209.31, the Secretary shall appoint the members of the Council on the basis of representation provided for in § 1209.30, except that no more than one member may be appointed to the Council from nominations submitted by any one producer or importer.

* * * *

§ 1209.38 Powers.

The Council shall have the following powers:

(a) To receive and evaluate or, on its own initiative, develop and budget for proposed programs, plans, or projects to promote the use of mushrooms, as well as proposed programs, plans, or projects for research, consumer information, or industry information, and to make recommendations to the Secretary regarding such proposals;

(b) To administer the provisions of this subpart in accordance with its terms and provisions;

(c) To appoint or employ such individuals as it may deem necessary, define the duties, and determine the compensation of such individuals;

(d) To make rules and regulations to effectuate the terms and provisions of this subpart;

(e) To receive, investigate, and report to the Secretary for action complaints of violations of the provisions of this subpart;

(f) To disseminate information to producers, importers, first handlers, or industry organizations through programs or by direct contact using the public postal system or other systems;

(g) To select committees and subcommittees of Council members, including an executive committee whose powers and membership shall be determined by the Council, subject to the approval of the Secretary, and to adopt such bylaws and other rules for the conduct of its business as it may deem advisable;

(h) To establish committees which may include individuals other than Council members, and pay the necessary and reasonable expenses and fees for the members of such committees;

(i) To recommend to the Secretary amendments to this subpart;

(j) With the approval of the Secretary, to enter into contracts or agreements with national, regional, or State mushroom producer organizations, or other organizations or entities, for the development and conduct of programs, plans, or projects authorized under § 1209.40 and with such producer

organizations for other services necessary for the implementation of this subpart, and for the payment of the cost thereof with funds collected and received pursuant to this subpart. The Council shall not contract with any producer or importer for the purpose of mushroom promotion or research. The Council may lease physical facilities from a producer or importer for such promotion or research, if such an arrangement is determined to be cost effective by the Council and approved by the Secretary. Any contract or agreement shall provide that:

(1) the contractor or agreeing party shall develop and submit to the Council a program, plan, or project together with a budget or budgets that shall show the estimated cost to be incurred for such program, plan, or project;

(2) any such program, plan, or project shall become effective upon approval of the Secretary;

(3) the contracting or agreeing party shall keep accurate records of all of its transactions and make periodic reports to the Council of activities conducted, submit accountings for funds received and expended, and make such other reports as the Secretary or the Council may require; and the Secretary may audit the records of the contracting or agreeing party periodically; and

(4) any subcontractor who enters into a contract with a Council contractor and who receives or otherwise uses funds allocated by the Council shall be subject to the same provisions as the contractor;

(k) With the approval of the Secretary, to invest, pending disbursement pursuant to a program, plan, or project, funds collected through assessments provided for in § 1209.51, and any other funds received by the Council in, and only in, obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in

obligations fully guaranteed as to principal and interest by the United States;

(l) Such other powers as may be approved by the Secretary; and

(m) To develop and propose to the Secretary voluntary quality and grade standards for mushrooms, if the Council determines that such quality and grade standards would benefit the promotion of mushrooms.

* * * *

§ 1209.39 Duties.

The Council shall have the following duties:

(a) To meet not less than annually, and to organize and select from among its members a chairperson and such other officers as may be necessary;

(b) To evaluate or develop, and submit to the Secretary for approval, promotion, research, consumer information, and industry information programs, plans, or projects;

(c) To prepare for each fiscal year, and submit to the Secretary for approval at least 60 days prior to the beginning of each fiscal year, a budget of its anticipated expenses and disbursements in the administration of this subpart, as provided in § 2109.50.

(d) To maintain such books and records, which shall be available to the Secretary for inspection and audit, and to prepare and submit such reports from time to time to the Secretary, as the Secretary may prescribe, and to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it;

(e) To prepare and make public, at least annually, a report of its activities carried out, and an accounting for funds received and expended;

(f) To cause its financial statements to be prepared in conformity with generally accepted accounting principles and to be audited by an independent certified public accountant in accordance with generally accepted auditing standards at least once each fiscal year and at such other times as the Secretary may request, and submit a copy of each such audit to the Secretary;

(g) To give the Secretary the same notice of meetings of the Council as is given to members in order that the Secretary, or a representative of the Secretary, may attend such meetings;

(h) To submit to the Secretary such information as may be requested pursuant to this subpart;

(i) To keep minutes, books, and records that clearly reflect all the acts and transactions of the Council. Minutes of each Council meeting shall be promptly reported to the Secretary;

(j) To act as intermediary between the Secretary and any producer or importer;

(k) To follow the Department's equal opportunity/civil rights policies; and

(l) To work to achieve an effective, continuous, and coordinated program of promotion, research, consumer information, and industry information designed to strengthen the mushroom industry's position in the marketplace, maintain and expand existing markets and uses for mushrooms, develop new markets and uses for mushrooms, and to carry out

programs, plans, and projects designed to provide maximum benefits to the mushroom industry.

* * * *

§ 1209.40 Programs, plans, and projects.

(a) The Council shall receive and evaluate, or on its own initiative develop, and submit to the Secretary for approval any program, plan, or project authorized under this subpart. Such programs, plans, or projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate programs for promotion, research, consumer information, and industry information with respect to mushrooms; and

(2) The establishment and conduct of research with respect to the sale, distribution, marketing, and use of mushrooms and mushroom products, and the creation of new products thereof, to the end that marketing and use of mushrooms may be encouraged, expanded, improved or made more acceptable. However, as prescribed by the Act, nothing in this subpart may be construed to authorize mandatory requirements for quality control, grade standards, supply management programs, or other programs that would control production or otherwise limit the right of individual producers to produce mushrooms.

(b) No program, plan, or project shall be implemented prior to its approval by the Secretary. Once a program, plan, or project is so approved, the Council shall take appropriate steps to implement it.

(c) Each programs, plan, or project implemented under this subpart shall be reviewed or evaluated periodically by the Council to ensure that it contributes to an effective program of promotion, research, consumer information, or industry information. If it is found by the Council that any such pro-

gram, plan, or project does not contribute to an effective program of promotion, research, consumer information, or industry information, then the Council shall terminate such program, plan, or project.

(d) In carrying out any program, plan, or project, no reference to a brand name, trade name, or State or regional identification of any mushrooms or mushroom product shall be made. In addition, no program, plan, or project shall make use of unfair or deceptive acts or practices with respect to the quality, value, or use of any competing product.

* * * *

§ 1209.50 Budget and Expenses.

(a)(1) At least 60 days prior to the beginning of each fiscal year, and as may be necessary thereafter, the Council shall prepare and submit to the Secretary a budget for the fiscal year covering its anticipated expenses and disbursements in administering this subpart. Each such budget shall include:

(i) a statement of objectives and strategy for each program, plan, or project;

(ii) a summary of anticipated revenue, with comparative data for at least one preceding year;

(iii) a summary of proposed expenditures for each program, plan, or project; and

(iv) staff and administrative expense breakdowns, with comparative data for at least one preceding year.

Each budget shall include a rate of assessment for such fiscal year calculated, subject to § 1209.51(b), to provide adequate funds to defray its proposed expenditures and to provide for a reserve as set forth in paragraph (f). The Council may change such rate at any time, as provided in § 1209.51(b)(5).

(2)(i) Subject to paragraph (a)(2)(ii), any amendment or addition to an approved budget must be approved by the Sec-

retary, including shifting of funds from one program, plan, or project to another.

(ii) Shifts of funds which do not cause an increase in the Council's approved budget and which are consistent with governing bylaws need not have prior approval by the Secretary.

(b) The Council is authorized to incur such expenses, including provision for a reasonable reserve, as the Secretary finds are reasonable and likely to be incurred by the Council for its maintenance and functioning, and to enable it to exercise its powers and perform its duties in accordance with the provisions of this subpart. Such expenses shall be paid from funds received by the Council.

(c) The Council shall not use funds collected or received under this subpart to reimburse, defray, or make payment of expenditures incurred in developing, drafting, studying, lobbying on or promoting the legislation authorizing this subpart. Such prohibition includes reimbursement, defrayment, or payment to mushroom industry associations or organizations, producers or importers, lawyers, law firms, or consultants.

(d) The Council may accept voluntary contributions, but these shall only be used to pay expenses incurred in the conduct of programs, plans, and projects. Such contributions shall be free from any encumbrance by the donor and the Council shall retain complete control of their use. The donor may recommend that the whole or a portion of the contribution be applied to an ongoing program, plan, or project.

(e) The Council shall reimburse the Secretary, from funds received by the Council, for administrative costs incurred by the Secretary in implementing and administering this subpart, except for the salaries of Department employees incurred in conducting referenda.

(f) The Council may establish an operating monetary reserve and may carry over to subsequent fiscal periods excess funds in any reserve so established, except that the funds in the reserve shall not exceed approximately one fiscal year's expenses. Such reserve funds may be used to defray any expenses authorized under this subpart.

(g) With the approval of the Secretary, the Council may borrow money for the payment of administrative expenses, subject to the same fiscal, budget, and audit controls as other funds of the Council.

* * * *

§ 1209.51 Assessments.

(a) Any first handler initially purchasing, or otherwise placing into the current of commerce, mushrooms produced in the United States shall, in the manner as prescribed by the Council and approved by the Secretary, collect an assessment based upon the number of pounds of mushrooms marketed in the United States for the account of the producer, and remit the assessment to the Council.

(b) The rate of assessment effective during any fiscal year shall be the rate specified in the budget for such fiscal year approved by the Secretary, except that:

(1) The rate of assessment during the first year this subpart is in effect shall be one-quarter of one cent per pound of mushrooms marketed, or the equivalent thereof.

(2) The rate of assessment during the second year this subpart is in effect shall not exceed one-third of one cent per pound of mushrooms marketed, or the equivalent thereof.

(3) The rate of assessment during the third year this subpart is in effect shall not exceed one-half of one cent per pound of mushrooms marketed, or the equivalent thereof.

(4) The rate of assessment during each of the fourth and following years this subpart is in effect shall not exceed one cent per pound of mushrooms marketed, or the equivalent thereof.

(5) The Council may change the rate of assessment for a fiscal year at any time with the approval of the Secretary as necessary to reflect changed circumstances, except that any such changed rate may not exceed the level of assessment specified in paragraphs (b)(1), (2), (3), or (4), whichever is applicable.

(c) Any person marketing mushrooms of that person's own production to consumers in the United States, either directly or through retail or wholesale outlets, shall be considered a first handler and shall remit to the Council an assessment on such mushrooms at the rate per-pound then in effect, and in such form and manner prescribed by the Council.

(d) Only one assessment shall be paid on each unit of mushrooms marketed.

(e)(1) Each importer of mushrooms shall pay an assessment to the Council on mushrooms imported for marketing in the United States, through the U.S. Customs Service or in such other manner as may be established by rules and regulations approved by the Secretary.

(2) The per-pound assessment rate for imported mushrooms shall be the same as the rate provided for mushrooms produced in the United States.

(3) The import assessment shall be uniformly applied to imported mushrooms that are identified by the number, 0709.51.0000, in the Harmonized Tariff Schedule of the United States or any other number used to identify fresh mushrooms.

(4) The assessments due on imported mushrooms shall be paid when the mushrooms are entered or withdrawn for consumption in the United States, or at such other time as may be

established by rules and regulations prescribed by the Council and approved by the Secretary and under such procedures as are provided in such rules and regulations.

(5) Only one assessment shall be paid on each unit of mushrooms imported.

(f) The collection of assessments under this section shall commence on all mushrooms marketed in or imported into the United States on or after the date established by the Secretary, and shall continue until terminated by the Secretary. If the Council is not constituted on the date the first assessments are to be collected, the Secretary shall have the authority to receive assessments on behalf of the Council and may hold such assessments until the Council is constituted, then remit such assessments to the Council.

(g)(1) Each person responsible for remitting assessments under paragraphs (a), (c), or (e) shall remit the amounts due from assessments to the Council on a monthly basis no later than the fifteenth day of the month following the month in which the mushrooms were marketed, in such manner as prescribed by the Council.

(2)(i) A late payment charge shall be imposed on any person that fails to remit to the Council the total amount for which the person is liable on or before the payment due date established under this section. The amount of the late payment charge shall be prescribed in rules and regulations as approved by the Secretary.

(ii) An additional charge shall be imposed on any person subject to a late payment charge, in the form of interest on the outstanding portion of any amount for which the person is liable. The rate of interest shall be prescribed in rules and regulations as approved by the Secretary.

(3) Any assessment that is determined to be owing at a date later than the payment due established under this section, due to a person's failure to submit a report to the Council by the payment due date, shall be considered to have been payable

on the payment due date. Under such a situation, paragraphs (g)(2)(i) and (g)(2)(ii) of this section shall be applicable.

(h) The Council, with the approval of the Secretary, may enter into agreements authorizing other organizations to collect assessments in its behalf. Any such organization shall be required to maintain the confidentiality of such information as is required by the Council for collection purposes. Any reimbursement by the Council for such services shall be based on reasonable charges for services rendered.

(i) The Council is hereby authorized to accept advance payment of assessments for the fiscal year by any person, that shall be credited toward any amount for which such person may become liable. The Council shall not be obligated to pay interest on any advance payment.

* * * *

§ 1209.52 Exemption from assessment.

(a) Persons that produce or import, on average, 500,000 pounds or less of mushrooms annually shall be exempted from assessment.

(b) To claim such exemption, such persons shall apply to the Council, in the form and manner prescribed in the rules and regulations.

(c) Mushrooms produced in the United States that are exported are exempt from assessment and are subject to such safeguards as prescribed in rules and regulations to prevent improper use of this exemption.

(d) Domestic and imported mushrooms used for processing are exempt from assessment and are subject to such safe-

guards as prescribed in rules and regulations to prevent improper use of this exemption.

* * * *

§ 1209.53 Influencing governmental action.

No funds received by the Council under this subpart shall in any manner be used for the purpose of influencing legislation or governmental policy or action, except to develop and recommend to the Secretary amendments to this subpart, and to submit to the Secretary proposed voluntary grade and quality standards for mushrooms.

* * * *

§ 1209.71 Suspension or termination.

(a) Whenever the Secretary finds that this subpart or any provision thereof obstructs or does not tend to effectuate the declared policy of the Act, the Secretary shall terminate or suspend the operation of this subpart or such provision thereof.

(b)(1) Five years after the date on which this subpart becomes effective, the Secretary shall conduct a referendum among producers and importers to determine whether they favor continuation, termination, or suspension of this subpart.

(2) Effective beginning three years after the date on which this subpart becomes effective, the Secretary, on request of a representative group comprising 30 percent or more of the number of mushroom producers and importers, may conduct a referendum to determine whether producers and importers favor termination or suspension of this subpart.

(3) Whenever the Secretary determines that suspension or termination of this subpart is favored by a majority of the mushroom producers and importers voting in a referendum

under paragraphs (b) (1) or (2) who, during a representative period determined by the Secretary, have been engaged in producing and importing mushrooms and who, on average, annually produced and imported more than 50 percent of the volume of mushrooms produced and imported by all those producers and importers voting in the referendum, the Secretary shall:

(i) suspend or terminate, as appropriate, collection of assessments within six months after making such determination; and

(ii) suspend or terminate, as appropriate, all activities under this subpart in an orderly manner as soon as practicable.

(4) Referenda conducted under this subsection shall be conducted in such manner as the Secretary may prescribe.

APR 9 2001

CLERK

No. 00-276

In the Supreme Court of the United States

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS

v.

UNITED FOODS, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondent suggests only one basis for distinguishing the generic advertising program for mushrooms from the generic advertising programs for California tree fruits sustained in *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). In respondent's view, unless tied to "supply-side controls" (Br. 32), such programs are unconstitutional. Respondent does not explain why the presence or absence of such additional non-speech regulation of the supply of a commodity is relevant to the application of the First Amendment to commercial advertising designed to stimulate demand for the commodity. And it is not. The Court held in *Wileman* that the generic advertising programs for California tree fruits are consistent with the First Amendment because they do not restrain a producer from communicating any message to any audience, require a producer to engage in actual or symbolic speech, or compel a producer to endorse or to finance any political or ideological views. See *Wileman*, 521 U.S. at 469-470. The generic advertising program in this case likewise has none of those adverse effects on producers' freedom of speech. It therefore does not "warrant special First Amendment scrutiny." *Id.* at 474.

The mushroom advertising program also does not implicate the First Amendment for an independent reason: The program involves government speech—on a topic selected by Congress and through means overseen by the Secretary of Agriculture—funded by those whom Congress expected would benefit most from the speech. Respondent suggests no valid reason why this government program should be viewed any differently, with respect to its impact on interests protected by the First Amendment, from other government programs that are targeted at a particular

industry and that are funded with taxes or user fees imposed on that industry.

I. THE MUSHROOM ADVERTISING PROGRAM IS VALID UNDER THE FIRST AMENDMENT

Respondent principally contends that *Wileman* turned on the comprehensive nature of the marketing orders establishing the generic advertising programs for California tree fruits, and thus is distinguishable from this case. Br. 21. As our opening brief explains, that proposition has scant support in *Wileman* (U.S. Br. 21-24), rests on an erroneous premise regarding the extent of regulation of the California tree fruit industries (*id.* at 27-28), and, most importantly, has no bearing on the extent to which a generic advertising program implicates interests protected by the First Amendment (*id.* at 24-26, 29-31).[1]

1. As this Court recognized in *Wileman*, generic advertising programs for agricultural commodities are different, in three critical respects, from laws that have been held to violate the freedom of speech protected by the First

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[1] Respondent attempts (*e.g.*, Br. 22) to support that proposition with selective quotations from the United States' briefs and oral argument in *Wileman*. But those quotations, in context, confirm that the United States has consistently maintained that the constitutionality of a collective advertising program rests not on the presence of additional regulation, but on "the nonspeech-related purpose of establishing stable and orderly marketing conditions and enhancing returns to growers"—a purpose that, depending upon the circumstances of a particular market, the government may seek to advance through a generic advertising program or "an array of [other] mechanisms." U.S. Reply Br. at 3 in *Wileman*, *supra*, No. 95-1184); see Oral Arg. Tr. 13 (relying on the legitimacy of the government's interest in "establishing orderly market conditions" for commodities). Indeed, given the number of stand-alone generic advertising programs established under federal law (see Pet. 13-14 & n.7), it would have been surprising for the government to have urged the Court to sustain the programs for California tree fruits under an analysis that would call into question the constitutionality of other generic advertising programs.

Amendment: They "impose no restraint on the freedom of any producer to communicate any message to any audience," they "do not compel any person to engage in any actual or symbolic speech," and they "do not compel the producers to endorse or to finance any political or ideological views." 521 U.S. at 469-470. None of those distinctions is any more, or less, true depending upon whether the advertised commodity is, or is not, regulated in other respects.

The Court made clear in *Wileman* that the First Amendment is not implicated by every law that requires the funding of expressive activity. See 521 U.S. at 471-473. The Court distinguished decisions, such as *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), which involved assessments to fund expressive and associational activities of an inherently "political" or "ideological" nature, such as collective bargaining. See 521 U.S. at 472. The Court explained that it "cannot be said to engender any crisis of conscience" to require producers to fund generic advertising for their own commodity. *Ibid.* For that reason, the Court concluded, an agricultural enterprise's objections to paying such assessments are not comparable to those of the teachers in *Abood*, "in which an objection rested on political or ideological disagreement with the content of the message." *Ibid.*[2] It is irrelevant to that distinction whether or

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[2] The Court recognized that producers' objections to the content of particular advertisements, on grounds that they are not in good taste or that they suggest that all handlers' products are the same, did not call into question the constitutionality of the generic advertisement program. See *Wileman*, 521 U.S. at 467-468 nn. 10, 11. Similarly, respondent's objections to certain advertising of the Mushroom Council, such as the 1994 "Let Your Love Mushroom" promotion, do not undermine the constitutionality of the program. Respondent's claims that, for example, "[t]he Mushroom Council[] suggest[ed] that mushrooms are an aphrodisiac" (Br. 44) as part of that campaign are both legally irrelevant and factually exaggerated. The "suggestion" about which respondent apparently

not the commodity is also subject to other regulations that have nothing to do with any expressive activity.

The Court also distinguished *Abood* and similar cases on a second, independent ground. The Court explained that those cases allow objectors to be assessed even for political or ideological activities, as long as those activities are "'germane' to the purpose for which compelled association was justified," such as achieving labor peace. *Wileman*, 521 U.S. at 473 (quoting *Keller* v. *State Bar*, 496 U.S. 1, 13 (1990)). Thus, although compelled contributions for political or ideological speech *implicate* the First Amendment (whereas compelled contributions for commercial advertising do not), they do not *violate* the First Amendment if the speech is "germane" to a legitimate government purpose. The Court recognized that "the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders," *ibid.*, which the Court identified as advancing "the producers' and handlers' common interest in promoting the sale of a particular product" and thereby "disposing of their output on favorable terms," *id.* at 462. That is essentially the same purpose that Congress articulated in the Mushroom Act. See 7 U.S.C. 6101(b). A generic advertising program is equally "germane" to that purpose whether or not the government is also seeking to advance the purpose through other means. Here, therefore, the absence of quality, maturity, and packaging

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complains was contained in a brochure, distributed in connection with Valentine's Day, that principally consisted of mushroom recipes; mushroom purchasing, cooking, and storage tips; and advice on planning a "romantic" meal (*e.g.*, candlelight, flowers, music). The brochure also briefly noted, without endorsement, that "[t]he ancient philosopher Petronius and many others proclaimed mushrooms as a potent aphrodisiac and popular 'love' food," and that "[f]or centuries, legends have attributed mushrooms with special mystical powers that cure illness, prolong life and enhance sexuality." We have lodged copies of the brochure with the Court.

requirements for mushrooms, similar to those for the tree fruits in *Wileman*, has no bearing on the germaneness of the generic advertising program to the government's purpose of maintaining and expanding the mushroom market.

It is unnecessary for the Court to address in this case whether the First Amendment is satisfied if the expression for which funding is compelled is *either* non-ideological *or* germane to a valid government purpose, but not both. Here, as in *Wileman*, both requirements are met because "(1) the generic advertising of [mushrooms] is unquestionably germane to the purposes of the [Mushroom Act and Mushroom Order] and, (2) in any event, the assessments are not used to fund ideological activities." *Wileman*, 521 U.S. at 473.[3]

2. Respondent notes (Br. 24-26) several references in the *Wileman* opinion to the "other features of the marketing

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[3] As we have explained (U.S. Br. 16-17 n.9), the Court's use of the term "in any event" indicates that, at least in the context of generic advertisement programs like those in this case and *Wileman*, the First Amendment is satisfied if the generic advertising is either germane to the government's purpose or non-ideological. That conclusion is reinforced by the structure of Part IV of the Court's opinion. The Court first concluded that the producers did not "have a First Amendment complaint," because their objections to payment of the assessments did not, and could not, "rest[] on political or ideological disagreement with the content of the message." 521 U.S. at 472. Then, in a new paragraph introduced with the word "[m]oreover," the Court addressed the germaneness question. *Id.* at 472-473. The Court has also suggested in other contexts that the germaneness of the expressive activity for which assessments are used becomes relevant, for First Amendment purposes, only when that activity is to some extent political or ideological. See, *e.g.*, *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 529 (1991) (allowing the use of objecting teachers' contributions to fund portions of publications that, although not germane to collective bargaining, were "neither political nor public in nature"). The Court's decision in *Board of Regents* v. *Southworth*, 529 U.S. 217 (2000), upon which respondent relies (Br. 36-37), is inapposite because the student activity fees in that case were used to fund expression that was in many instances ideological.

orders" for California tree fruits. 521 U.S. at 476; see also *id.* at 470, 476. As we have explained (U.S. Br. 21-24), those observations are not essential elements of the Court's First Amendment analysis.[4] As discussed above (at 2-4), the First Amendment concerns that the Court identified as relevant to that analysis—whether producers are restrained from communicating any message to any audience, required to engage in actual or symbolic speech, or compelled to endorse or fund political or ideological views, see 521 U.S. at 469-470—are unaffected by the existence, or absence, of such additional regulatory provisions. The Court's references to those provisions are most naturally read as reflecting the conclusion that a producer's obligation to fund a generic advertising program for its commodity is no different, for any reason relevant to First Amendment interests, from a producer's

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[4] Respondent errs in asserting (Br. 25) that the Court's core First Amendment analysis in *Wileman* is contained not in Part IV of the opinion, but "principally in Part III * * * and in Part V." As we have noted (U.S. Br. 21-22), Part III is an introductory section, which describes the scope of the controversy. Significantly, the final paragraph of Part III, which discusses "the statutory context" in which the case arose, concludes by stating that "[i]t is in this context that we *consider* whether" the generic advertising programs should be reviewed "under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment issues." 521 U.S. at 469 (emphasis added). It is in Part IV of the opinion that the Court proceeds to its consideration of the question posed. Part V, the other section of the opinion on which respondent relies, mentions only one First Amendment case, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), which the Court had already determined in Part IV to be inapposite. See 521 U.S. at 469 & n.12, 474 & n.18. Part IV, in contrast, considers the relevance of 16 First Amendment cases, and concludes with the holding that generic advertising programs do not "warrant special First Amendment scrutiny." *Id.* at 474. The dissenting opinion in *Wileman* had no difficulty in discerning the portion of the majority's opinion that contains its core First Amendment analysis. See *id.* at 477 (Souter, J., dissenting) (summarizing majority's analysis).

obligation to comply with other regulatory requirements that Congress might impose for the purpose of promoting demand (or controlling supply) of the commodity. It is therefore appropriate to review all such measures under the same deferential standard. See *id.* at 477 (describing the generic advertising programs for California tree fruits as "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress").

3. Respondent does not embrace the court of appeals' rationale for distinguishing *Wileman*: that the marketing orders there conferred on producers "the monopoly powers inherent in government control of price and supply," and that the producers could be required "[i]n exchange for such power" to fund a generic advertising program. Pet. App. 8a. As our opening brief explains (U.S. Br. 27-28), that rationale rests on an erroneous premise: The marketing orders in *Wileman* did not, in fact, impose "government control of price and supply" (or otherwise vest producers with "monopoly powers"), but rather imposed only quality, maturity, and packaging requirements.[5]

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[5] As we have noted (U.S. Br. 28-29), the same regulations imposed on the California tree fruit industries—or more extensive regulations concerning price and supply—could be imposed on the mushroom industry in marketing orders issued pursuant to the Agricultural Marketing Agreements Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.* The AMAA is applicable, with exceptions not relevant here, to "any agricultural commodity," 7 U.S.C. 608c(2), including mushrooms. Respondent's assertion (Br. 28) that "[f]ederal law relating to mushroom marketing * * * not only does not mandate * * * collective controls on supply, *it forbids them*," is misleading. The Mushroom Act states merely that "[n]othing in this chapter [*i.e.*, the Mushroom Act itself] may be construed to provide for the control of production or otherwise limit the right of individual producers to produce mushrooms." 7 U.S.C. 6101(c). Neither the Mushroom Act nor any other statute "forbids" the imposition of "collective controls on supply" of mushrooms in marketing orders under the AMAA.

Respondent does, however, attempt a variation on the court of appeals' theme, which proceeds from the (also erroneous) premise that the quality standards in *Wileman* resulted in "homogenization" of the fruits to the benefit of producers.[6] Respondent asserts (Br. 23-24) that "*Wileman* concludes that the government could, as a related economic measure in the same marketing orders, require the producers who benefit from such collectivization to contribute to a generic advertising program that reflects the characteristics of the homogenized product." Tellingly, respondent cites no page in *Wileman* on which this "conclu[sion]" supposedly appears. Nor could respondent do so. Nothing in *Wileman* suggests, much less holds, that producers may be required to fund a generic advertising program only when they obtain some separate "benefit" from government regulation aside from the benefit that they obtain from the generic advertising program itself. Indeed, the homogenization "benefit" that respondent postulates was vigorously disputed by the fruit handlers in *Wileman*, who denied that all California tree fruits were "of equal quality," 521 U.S. at 467 n.10; thus, if the Court's analysis were predicated on a contrary factual determination, the Court surely would have said so.

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[6] A marketing order that sets minimum quality standards does not "homogenize" a commodity, because growers retain the ability to differentiate their own product, including by competing with respect to quality above the minimum standard. The marketing orders in *Wileman*, moreover, left growers free to produce any of the numerous varieties of those fruits. See, *e.g.*, 7 C.F.R. 916.356 (1999) (listing 111 varieties of California nectarines); 7 C.F.R. 917.459 (1999) (listing 98 varieties of California peaches). Indeed, the respondents in *Wileman* objected to the marketing orders on the ground, among others, that generic advertising erroneously implied that "all California fruit is the same," whereas, in fact, "the commodities are highly varied" in type and quality. 521 U.S. at 468 n.10; see *id.* at 467 n.11.

Respondent's theory is without support not only in *Wileman* itself but also in First Amendment jurisprudence generally. This Court's cases involving compelled payments for expressive or associational activity assume that payors will receive some benefit from that very activity. See *Abood*, 431 U.S. at 222 (explaining that union-shop arrangements are "thought to distribute fairly the cost of [negotiating and administering collective bargaining agreements] among those who benefit"). But those cases do not hold that payors must also receive some regulatory benefit *in addition to* the benefit they receive from the expressive or associational activity. Nor is there any reason to conclude that the existence, or absence, of some separate regulatory benefit bears on whether, or to what extent, the payor's First Amendment interests have been infringed.

4. Respondent also suggests (Br. 15-21) that there is not a sufficient public or governmental interest to justify the Mushroom Act, that the generic advertising program does not adequately serve the interest that Congress identified, and that Congress did not suitably tailor the Act's assessment provisions to avoid "free-rider" concerns. The short answer is that, in matters of economic regulation, Congress's choices are entitled to a "strong presumption of validity." *Wileman*, 521 U.S. at 477; accord, *e.g.*, *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313-315 (1993); *Railway Employees' Dep't* v. *Hanson*, 351 U.S. 225, 234 (1956). Respondent has not rebutted that presumption here. In any event, generic advertising program for mushrooms is valid, even under a less deferential standard of review.[7]

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[7] Respondent errs in asserting (Br. 16) that the United States has somehow "waived" an argument that the generic advertising program for mushrooms satisfies the test articulated in *Central Hudson*, 447 U.S. at 566, or some other First Amendment test that respondent might urge the Court to adopt. The Court made clear in *Wileman* that "the *Central Hudson* test, which involved a restriction on commercial speech, should

First, as our opening brief notes (U.S. Br. 2-3), Congress reasonably concluded that the Mushroom Act, and the generic advertising program that it authorized, would serve an important interest: "the maintenance and expansion of existing markets and uses, and the development of new markets and uses, for mushrooms"—an interest that Congress deemed "vital to the welfare of producers," other members of the industry, and "the agricultural economy of the Nation." 7 U.S.C. 6101(a)(5); see *Wileman*, 521 U.S. at 476 (noting "legitima[cy]" of Congress's purpose of "stimulat[ing] consumer demand for an agricultural product"). The record developed by Congress with respect to the Mushroom Act demonstrated the need to "increase the stability of the mushroom market." H.R. Rep. No. 568, 101st Cong., 2d Sess. 45 (1990). For example, Members of Congress believed it crucial to the domestic mushroom industry to expand the market for fresh mushrooms, because the market for mushrooms to be used in canning had been "practically * * * destroyed" as a result of dramatic increases in imports of canned mushrooms. *Research, Promotion, and Consumer Information Programs: Hearings Before the Subcomm. on Domestic Mktg., Consumer Relations, and Nutrition of the House Comm. on Agric.*, 101st Cong., 1st Sess. 81 (1989) (*Mushroom Act Hearings*) (Rep. Schulze); accord *id.* at 82 (Rep. Panetta). Congress was also made aware that per capita mushroom consumption in the United States was less than half that in Canada, Great Britain, and the Netherlands, see H.R. Rep. 568, *supra*, at 45, which suggested the desirability of "unit[ing] the industry to

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[not] govern a case involving the compelled funding of speech." 521 U.S. at 474 n.18; accord *id.* at 469 & n.12. There was thus no reason in this case (as there was in *Wileman*, where that question had not yet been resolved, and where the court of appeals relied on *Central Hudson*) to make a separate argument that the generic advertising program satisfies the *Central Hudson* test.

provide the critical mass needed to initiate beneficial research and consumer information efforts." *Mushroom Act Hearings* 87 (Rep. Panetta); see also *id.* at 78 (Rep. Schulze) (noting that "[a]s separate entities, the smaller growers * * * have no vehicle for getting this information out to the public").[8]

Second, Congress also reasonably concluded that a generic advertising program would advance the governmental interest in strengthening the mushroom industry. Congress enacted the Mushroom Act against the backdrop of similar generic advertising programs already in existence for other agricultural commodities. If such programs had not been effective to maintain and expand markets, then Congress, together with members of the mushroom industry, would not have urged adoption of the Mushroom Act. In practice, moreover, the generic advertising program has proven effective in maintaining and expanding the mushroom market. As our opening brief notes (U.S. Br. 6 & n.6), growers and importers subject to assessments under the

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[8] The validity of Congress's interest in strengthening the mushroom market is not, as respondent suggests (Br. 30), undermined by the distinctive characteristics of mushrooms or their cultivation. For example, the mere fact that mushrooms grow indoors in a controlled environment does not insulate mushroom producers from many of the same "production perils" that affect producers of other agricultural commodities, including disease, insect damage, and extremes of weather (which can "damag[e] the mushroom house," "make[] controlling the inside climate difficult," and "interfere with compost production"). Economic Research Serv., U.S. Dep't of Agric., *Mushrooms: An Economic Assessment of the Feasibility of Providing Multiple-Peril Crop Insurance* 24-28 (Apr. 28, 1995) (*available at* <*http://www.rma.usda.gov/pilots/feasible/txt/mushrooms.txt*>); see also *Mushroom Act Hearings* 105 (chairman of mushroom producers' organization explaining that "[o]ur crops are subject to problems as most of agriculture is from disease or pests or strains that lose their integrity, problems with labor," etc.).

Mushroom Act voted overwhelmingly in a 1998 referendum to continue the generic advertising program, thereby expressing the industry's consensus that the program is serving its purpose. See *Wileman*, 521 U.S. at 476 ("At least a majority of the producers in each of the markets in which such advertising is authorized must be persuaded that it is effective, or presumably the programs would be discontinued.").[9] Moreover, an econometric study conducted by an independent research organization has since concluded that the activities of the Mushroom Council have "clearly had a consistent and significant positive impact on the overall demand for fresh mushrooms in the US." Food Marketing and Economics Group, *Mushroom Council Program Effectiveness Review 1999*, at 7 (Feb. 2000) (copies lodged with the Court).[10]

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[9] Respondent claims (Br. 18-19) that it "would not benefit" from the greater demand for mushrooms generated by the Mushroom Council's activities, because "increased supplies from competitors will preclude [respondent] from increasing its sales or benefiting from higher prices." It is not apparent, however, why respondent could not increase its supplies along with its competitors. In any event, respondent acknowledges that other mushroom producers, even if not respondent itself, increase their production of mushrooms in response to increases in demand—conduct that would be economically rational only if such increased production was profitable for those-producers (*i.e.*, if the marginal benefits exceeded the marginal costs). That is precisely sort of benefit to the mushroom industry that Congress sought to achieve in the Mushroom Act.

[10] Respondent quotes (Br. 20) from a 1996 administrative law judge's opinion (which was subsequently overturned in light of *Wileman*) that the generic advertising program "has not been shown to directly advance the government's interest in stimulating and expanding the mushroom industry." But respondent omits the ALJ's reason for arriving at that conclusion: that the program "cannot be measured econometrically because the program is relatively new, and several years' data are necessary to conduct a complete analysis." J.A. 95. As noted in the text, such an econometric study now has been conducted.

Third, Congress reasonably structured the assessment provisions of the Mushroom Act to address concerns about "free riders." Congress was made aware that voluntary generic advertising programs in the mushroom industry had proved unworkable because some producers declined to contribute. See *Mushroom Act Hearings* 95-96 (testimony of president of American Mushroom Institute).[11] Congress's decision to exempt the smallest producers and importers does not, as respondent suggests (Br. 16-17), undermine the validity of Congress's "free-rider" concerns. See 7 U.S.C. 6102(6) and (11) (defining "importer" and "producer" as those who import or produce more than 500,000 pounds of mushrooms a year). Congress could reasonably conclude that the small sums that would be collected from small producers and importers would not warrant the added administrative and enforcement effort that would be entailed. See 136 Cong. Rec. 19,614 (1990) (colloquy between Sen. Fowler and Sen. Thurmond articulating that reason for a similar exemption). For example, at the current assessment rate of one-quarter cent per pound, a grower that produced 500,000 pounds of mushrooms would pay only $1250 annually.

Moreover, the referenda provision of the Mushroom Act takes into account the greater contribution of larger mushroom producers to the generic advertising program. See 7

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[11] Respondent suggests (Br. 16) that "free rider" concerns require that producers be granted a credit against the assessment for their own advertising. But the marketing orders in *Wileman* did not provide such credits. Respondent's argument also disregards the fact that generic advertising, which is designed to maintain or expand the market for a commodity, serves a different purpose from individual advertising, which is designed primarily to increase one producer's share of the market. See *Wileman*, 521 U.S. at 475 ("Independent advertising would be primarily motivated by the individual competitor's interest in maximizing its own sales, rather than in increasing the overall consumption of a particular commodity.").

U.S.C. 6105. Producers and importers that are exempt from assessments are not entitled to participate in referenda to approve the establishment or continuation of the program. Moreover, a majority for purposes of such referenda is based not only on the number of producers and importers voting, but also on the volume of mushrooms produced or imported by those voting, 7 U.S.C. 6105(a)(2) and (b)(2), thereby assuring that producers and importers who pay relatively small assessments do not dominate a referendum.[12]

II. THE MUSHROOM ADVERTISING PROGRAM IS INDISTINGUISHABLE FROM TAXPAYER-FUNDED GOVERNMENT SPEECH PROGRAMS THAT RESPONDENT CONCEDES WOULD BE CONSTITUTIONAL

1. As respondent acknowledges (Br. 40-42), this Court has discretion to consider whether the Mushroom Act and Mushroom Order establish a program of government speech, and thus are not subject to First Amendment constraints on that additional ground. That argument, although not raised or addressed below, "is fairly embraced within the question set forth in the petition for certiorari." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379-380 (1995).[13]

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[12] Respondent also complains (Br. 18) about a supposed "regional 'free-riding' effect," *i.e.*, that some of its assessments are used to finance promotional activities outside the markets in which it does business. But that is a consequence of a national generic advertising program, which Congress, at the suggestion of the Department of Agriculture (see *Mushroom Act Hearings* 127), decided was preferable to regional programs. There is no record support for respondent's assertion (Br. 18 n.13) that the Mushroom Council's programs are "targeted to regions where branded advertising has not already raised consumption levels."

[13] That question is "[w]hether the assessments imposed by the [Mushroom Act] * * * on members of the mushroom industry for advertising programs designed to support the industry violate the First Amendment." Pet. I.

Of course, if the Court sustains the generic advertising program for mushrooms under *Wileman*, the Court need not consider the government speech issue. Otherwise, however, the Court could avoid considerable disruption of that program and other such programs by resolving the government speech issue in this case. The question here, as in *Lebron*, is an essentially legal one that does not require factual development.[14] The issue has been fully briefed by the parties, and may appropriately be decided by the Court.

2. Respondent concedes (Br. 43) that Congress could constitutionally establish the same sort of generic advertising program for mushrooms if the program were financed though "general tax revenues." Respondent identifies no reason relevant to First Amendment interests why Congress cannot instead fund the program through a tax, or user fee, that is assessed against the very persons who benefit most from the program.[15] As we have noted (U.S. Br. 42-43

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[14] Contrary to respondent's suggestion (Br. 42 n.36), our footnote citation to a newspaper article about the generic advertising program for pork was not offered as "evidence" on the government speech issue. Nor do we agree with respondent's suggestion (*ibid.*) that the litigation over the pork referendum—which arose out of disputes over such issues as whether a sufficient number of valid signatures had been obtained on petitions seeking the referendum and whether the Secretary could conduct a referendum in the absence of such signatures—demonstrates that democratic controls over generic advertising programs are ineffective. It demonstrates only that the election process in a democracy does not always function smoothly.

[15] For that reason, the mushroom advertising program is unlike the government program hypothesized by respondent (Br. 44) that would require "the nation's 300 leading competitive runners to pay a special assessment to finance a costly scheme by the Surgeon General to advertise jogging's benefits." In that instance, the advertising program would benefit not the "competitive runners" who were required to pay for it, but the more sedentary persons who might be induced to begin jogging.

& n.28), user fees are an accepted means by which the government may recover the costs of its programs or services, including those relating to the exercise of First Amendment rights. See, *e.g.*, *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 215 (1989) (noting statutory trend "to make various federal regulatory programs partially or entirely self-financing"); *Cox* v. *New Hampshire*, 312 U.S. 569, 576-577 (1941) (a State may require a "reasonable" fee for a parade license to compensate local government for administrative and law-enforcement expenses); cf. *Board of Regents* v. *Southworth*, 529 U.S. 217, 229 (2000) (noting potential applicability of the government speech doctrine to programs of a state university "financed by tuition dollars," a form of use fee imposed on university students).

As respondent observes (Br. 44-45), the Third Circuit in *United States* v. *Frame*, 885 F.2d 1119, 1132-1133 (1989), cert. denied, 493 U.S. 1094 (1990), concluded that, although the question was "a close one," the similar generic advertising program for beef did not involve government speech.[16] The court deemed the government speech doctrine inapplicable because of the "close nexus between the individual [upon whom the assessment was imposed] and the message funded," suggesting that the situation "resemble[d]" those in *Abood*, *supra*, and *Wooley* v. *Maynard*, 430 U.S. 705 (1977). *Frame*, 885 F.2d at 1132-1133. But there is no basis in those cases, or in any of this Court's other First Amendment cases, to conclude that whether or not a government program involves "government speech" turns upon the particular

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In any event, such a program, whether sensible or not, would not present any obvious First Amendment problems under this Court's cases.

[16] The Third Circuit's discussion of the government speech question was unnecessary to its holding in *Frame*, which concluded, applying strict scrutiny, that the generic advertising program did not violate the First Amendment. See 885 F.2d at 1133-1137.

mechanism chosen by the government to fund that speech. *Abood* did not present any question of government speech; the case instead involved assessments for expressive and associational activity by a union. See *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring) ("[c]ompelled support of a private association is fundamentally different from compelled support of government"). *Wooley* was concerned not with whether an individual could be required to fund the State's "Live Free or Die" message, but with whether an individual could be required to "display[] it on his private property." 430 U.S. at 713; cf. *id.* at 721 (Rehnquist, J., dissenting) (assuming that the State could "erect a multitude of billboards, each proclaiming 'Live Free or Die,' and tax all citizens for the cost of erection and maintenance"). And both *Abood* and *Wooley*, in contrast to this case, involved the rights of individuals, as opposed to commercial entities, with respect to activity of an ideological, as opposed to commercial, nature.

3. Respondent does not seriously dispute that the Mushroom Council satisfies the three criteria upon which this Court relied in *Lebron* to conclude that Amtrak is "part of the Government for purposes of the First Amendment," and thus is subject to the constraints of the First Amendment when it restricts private speech. See *Lebron*, 513 U.S. at 400 (when "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment"). Nor does respondent offer any persuasive reason why the *Lebron* criteria are not equally applicable in determining whether the Mushroom Council is "part of the Government for purposes of the First Amendment" such that its speech constitutes government speech.

Respondent does argue (Br. 46), however, that the Mushroom Council's speech is not government speech because "'public officials' do *not* 'control operation' of the [Mushroom] Council." Respondent is wrong. As we have explained (U.S. Br. 34-40), Congress and the Secretary *do* exercise significant control over the Mushroom Council's speech and over its operations generally.

Congress has determined the essential message to be expressed by the Mushroom Council: speech to "enhance the image or desirability of mushrooms, including paid advertising," 7 U.S.C. 6102(12), and to "assist consumers and other persons in making evaluations and decisions regarding the purchase, preparation, and use of mushrooms," 7 U.S.C. 6102(2). Congress also determined how such speech is to be funded. See 7 U.S.C. 6104(g). Congress vested the Secretary with the responsibility of appointing all members of the Council, see 7 U.S.C. 6104(b), a responsibility that is not the mere "formal[ity]" that respondent claims (Br. 46). See 7 C.F.R. 1209.31(f) (requiring that two nominations be submitted to the Secretary for each open seat); 7 C.F.R. 1209.31(g)(1) ("The Secretary may reject any nominee submitted."). The Secretary has the authority to remove members from the Council—not, as respondent asserts (Br. 46), only in "exceptional circumstances," but whenever the Secretary determines that "such member's continued service would be detrimental to the achievement of the purposes of the Act." 7 C.F.R. 1209.35(c). And Congress prohibited the Council from implementing *any* "plan or project of promotion, research, consumer information, or industry information, or budget" before its approval by the Secretary. 7 U.S.C. 6104(d)(3).[17]

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[17] The Mushroom Council is described in its Independent Auditors' Report as "an instrumentality of the United States Department of Agriculture." J.A. 225; see J.A. 234 ("The Council is considered an instru-

Indeed, authorities cited by respondent recognize, with respect to similar generic advertising programs, that "the amount of government oversight of the program[s] is considerable." *Frame*, 885 F.2d at 1128; see *id.* at 1132 (noting that "the Secretary makes the final decisions on all projects funded under the [Beef] Act"). The Administrator of the Agricultural Marketing Service, in congressional testimony respondent cites (Br. 49), confirmed the extensive government oversight of such programs:

> USDA plays an active role in the oversight of the soybean program to ensure that it is administered by the Board in accordance with the authorizing legislation and Order. * * * * We approve budgets and projects, attend all meetings of the Board and its principal committees, approve board bylaws and amendments or additions to the budget, including any major shifting of program funds from one major area to another. We require information as to the objectives and strategy in each major program area, such as research and promotion, and ensure that all Board expenditures are in accordance with the Act and the Order and with USDA approved contracts and agreements.

Review of the National Soybean Checkoff Program: Hearing Before the Subcomm. on Gen. Farm Commodities of the House Comm. on Agric., 104th Cong., 2d Sess. 65 (1996).[18]

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mentality of the U.S. Department of Agriculture which conducts the administrative oversight of its activities."). That characterization, which is consistent with the statutory and regulatory scheme, refutes any contrary implication that might arguably be drawn from the isolated "press accounts" cited by respondent (Br. 47).

[18] Such extensive oversight by public officials of a speaker's operations may not be necessary in order for its speech to constitute government speech. See, *e.g.*, *Rosenberger* v. *Rector & Visitors*, 515 U.S. 819, 833 (1995) ("[W]e have permitted the government to regulate the content of

Finally, respondent incorrectly asserts (Br. 49) that "U.S.D.A. 'is *not* responsible for evaluating program effectiveness'" quoting a report that predates the enactment of the FAIR Act in 1996. See U.S. Br. 7-8. The FAIR Act requires each commodity board to authorize and fund, at least every five years, "an independent evaluation of the effectiveness of [its] generic commodity promotion program" for submission to the Secretary. 7 U.S.C. 7401(c) (Supp. V 1999). The FAIR Act specifies that those evaluations "will assist Congress and the Secretary of Agriculture in ensuring that the objectives of the programs are met," 7 U.S.C. 7401(b)(11) (Supp. V 1999), thus making clear that the Secretary, together with Congress, is "responsible for evaluating program effectiveness." See 7 U.S.C. 6110 ("The Secretary shall, whenever the Secretary finds that the [Mushroom] order or any provision of the order obstructs or does not tend to effectuate the declared policy of this chapter [*i.e.*, the Mushroom Act], terminate or suspend the operation of such order or provision.").

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Acting Solicitor General

APRIL 2001

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what is or is not expressed when it is the speaker *or when it enlists private entities to convey its own message.*") (emphasis added); see also *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 598 (1999) (Scalia, J., concurring) ("[I]t makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether [government] officials further their (and, in a democracy, our) favored point of view by achieving it directly * * *; or by advocating it officially * * *; *or by giving money to others who achieve or advocate it.*") (emphasis added).

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
Petitioners,

v.

UNITED FOODS, INC.,
Respondent.

**On Writ of Certiorari to
the United States Court of Appeals
for the Sixth Circuit**

BRIEF AMICI CURIAE FOR THE AMERICAN MUSHROOM INSTITUTE, THE NATIONAL CATTLEMEN'S BEEF ASSOCIATION, INC., THE AMERICAN SOYBEAN ASSOCIATION, THE NATIONAL MILK PRODUCERS FEDERATION, THE MILK INDUSTRY FOUNDATION, THE UNITED EGG PRODUCERS, INC., AND THE UNITED EGG ASSOCIATION, INC., IN SUPPORT OF PETITIONERS

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for the Sixth Circuit**

BRIEF AMICI CURIAE FOR THE AMERICAN MUSHROOM INSTITUTE, ET AL., IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST[1]

The American Mushroom Institute ("AMI") is a nationwide nonprofit trade association that represents mushroom producers, processors, buyers, and others involved in providing services and supplies to the mushroom industry. Its membership of more than 100

[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the amici curiae filing this brief made a monetary contribution to the preparation or submission of the brief.

commercial mushroom farms in the United States represents more than 90 percent of domestic mushroom production. AMI's members directly benefit from the mushroom promotion program conducted by the Mushroom Council pursuant to the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. §§ 6101-6112 ("the Mushroom Act"), the statute held unconstitutional by the Sixth Circuit in this case.

The National Cattlemen's Beef Association, Inc. ("NCBA"), which traces its lineage back to 1898, is a Colorado nonprofit corporation that acts as the primary national representative of the domestic cattle industry. NCBA members directly benefit from the promotion program undertaken by the Cattlemen's Beef Promotion and Research Board pursuant to the Beef Promotion and Research Act of 1985, 7 U.S.C. §§ 2901-2911.

The American Soybean Association ("ASA"), is a national, not-for-profit, grassroots membership organization that develops and implements policies to increase the profitability of its members and the entire soybean industry. ASA provides support services to its 28,500 producer members and 26 state affiliates, to its agribusiness sponsors, to farm broadcasters and journalists, and to export customers located in more than 100 countries. ASA's members represent a large percentage of the more than 70 million acres of soybeans planted each year in the United States. ASA's members directly benefit from the promotion programs conducted by the United Soybean Association, pursuant to the Soybean Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. §§ 6301-6311.

The National Milk Producers Federation ("NMPF"), founded in 1916, is the principal national representative for American dairy producers and the milk marketing cooperatives they own and operate. The members of NMPF's 27 cooperatives produce the majority of the U.S. milk supply, making the NMPF the voice of over 55,000 dairy producers nationwide. NMPF's members directly benefit from the promotion program conducted by the Dairy Promotion and Research Board pursuant to the Dairy Production Stabilization Act of 1983, 7 U.S.C. §§ 4501-4538.

The Milk Industry Foundation ("MIF"), founded in 1908, is a trade association that represents approximately 160 member companies that process, distribute, and market approximately 85 percent of the U.S. market for fluid milk, yogurt, cottage cheese, sour cream, soft cheeses, egg nog, cream, dairy dressing, and dips. MIF's members directly benefit from the promotion programs conducted by the National Processor Advertising and Promotion Board pursuant to the Fluid Milk Promotion Act of 1990, 7 U.S.C. §§ 6401-6417, and the Dairy Promotion and Research Board pursuant to the Dairy Production Stabilization Act of 1983, 7 U.S.C. §§ 4501-4538.

The United Egg Producers, Inc. ("UEP"), is a Georgia nonprofit trade association representing the majority of American egg producers. UEP's members directly benefit from the promotion program of the Egg Board pursuant to the Egg Research and Consumer Information Act of 1980, 7 U.S.C. §§ 2701-2718.

The United Egg Association, Inc. ("UEA"), is a District of Columbia nonprofit trade association representing the majority of American egg processors. UEA's

members also directly benefit from the Egg Board's promotion program.

In this case, Sixth Circuit held unconstitutional the Mushroom Act and the mushroom promotion program which directly benefits the members of amicus curiae AMI. Furthermore, the Sixth Circuit's First Amendment analysis—which departs from this Court's analysis in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997)—threatens the numerous other agricultural commodity promotion programs established pursuant to federal and state law, including the beef, soybean, dairy, and egg promotion programs that directly benefit the members of amici curiae NCBA, ASA, NMPF, MIF, UEP, and UEA.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a); the requisite consent letters have been filed with the Clerk.

INTRODUCTION

In *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), this Court considered a federal program requiring members of the California tree fruit industry to pay assessments used to fund the generic promotion of plums, peaches, and nectarines. Against the claim of some industry members that such assessments unlawfully compelled speech in violation of the First Amendment, this Court held that the program was constitutional—indeed, that the program did not even raise "a constitutional issue." *Id.* at 477.

The Sixth Circuit has now held that the promotion program carried out pursuant to the Mushroom Act

violates the First Amendment. This is not because of some difference between plums and mushrooms. Instead, the Sixth Circuit distinguished *Wileman* on the ground that the California tree fruit industry is "heavily regulated," while "there appears to be a relatively free market in mushrooms." Pet. App. 3a, 5a. Thus, in the Sixth Circuit's view, the constitutionality of a promotion program under *Wileman* "must turn on the degree of regulation of the industry." *Id.* at 4a.

The Sixth Circuit exhibited considerable reluctance to follow *Wileman*, which it disparaged (citing two law review items) as a "controversial 5-4 decision." *Id.* at 3a & n.2. It also seemed eager to strike down the Mushroom Act, which it derided as the product of "interest group lobbying," *id.* at 5a n.3, despite the admonition in *Wileman* that "[d]oubts concerning the policy judgments that underlie many features of this legislation" do not detract from "the constitutionality of these marketing orders." 521 U.S. at 476.

As this Court has said, "[j]udging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty" performed by the federal judiciary. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985) (internal quotation marks omitted). For this reason, this Court has long instructed that federal statutes must be presumed constitutional. *See Reno* v. *Condon*, 528 U.S. 141, 148 (2000) ("We of course begin with the time-honored presumption that the DPPA [Driver's Privacy Protection Act] is a 'constitutional exercise of legislative power.' ") (quoting *Close* v. *Glenwood Cemetery*, 107 U.S. 466, 475 (1883)). The Sixth Circuit ignored this admonition and misread the

Court's decision in *Wileman*. Its judgment should be reversed.

SUMMARY OF ARGUMENT

There can be no serious dispute that the speech funded by the Mushroom Act is neither ideological nor political. It is, after all, about mushrooms. The Sixth Circuit nevertheless found the compelled subsidy of that speech unconstitutional. Its decision focused on the level of industry regulation, and it held that what it perceived to be the relatively low level of collectivization in the mushroom industry rendered the speech not germane to any valid, comprehensive regulatory scheme, and that the subsidy was therefore unconstitutional.

The Sixth Circuit's decision was clearly wrong under *Wileman*. This Court's opinion there made plain that compelled funding of speech that is nonideological and nonpolitical—like the speech at issue here—raises no First Amendment issue and should be reviewed under the standard appropriate for review of economic regulation. That holding did not depend on any "germaneness" inquiry. In any event, even if such an inquiry were appropriate, it was met here. The speech at issue was not only germane to a valid governmental purpose; it was *itself* the governmental purpose.

In addition, the nature of the speech at issue—government speech—should preclude any First Amendment challenge. It is speech by an entity—the Mushroom Council—established pursuant to federal law to achieve defined governmental objectives. The members of the Council are appointed by a governmental officer and its activities are subject to his direction and control. While the First Amendment limits governmental interference

with private speech, it does not limit speech of the government itself. Because that is precisely what is at issue here, the First Amendment challenge should be rejected.

ARGUMENT

I. COMPELLED FUNDING OF NON-POLITICAL SPEECH RAISES NO FIRST AMENDMENT ISSUE.

The Sixth Circuit construed this Court's opinion in *Wileman* to mean that compelled funding of speech is constitutional only if the funded speech is not political or ideological *and* is germane to a legitimate collective program. The court below held that "[o]ur interpretation of *Wileman* is that if either of the two elements is missing * * * the First Amendment invalidates the compelled commercial speech." Pet. App. 7a. The Sixth Circuit's reading of *Wileman* on this point was central to its decision; while it concluded that the germaneness test was not satisfied, it conceded that the speech funded by the Mushroom Act is nonpolitical or nonideological. *See id.*

The court below erred in its interpretation of *Wileman*. *Wileman* identified three grounds to distinguish the regulatory scheme at issue there from "laws that we have found to abridge the freedom of speech protected by the First Amendment." 521 U.S. at 469-470 (discussing fact that marketing orders "impose no restraint on the freedom of any producer to communicate any message to any audience," "do not compel any person to engage in any actual or symbolic speech," and "do not compel the producers to endorse or to finance any political or ideological views"). None of these factors—all of which are equally satisfied here—turns in any way

on the level of industry regulation involved or the germaneness of that regulation to the speech at issue. Instead, the Court's opinion established that in the absence of the concerns that animated earlier First Amendment decisions, the marketing order would be reviewed under "the standard appropriate for review of economic regulation." *Id.* at 469.

While the *Wileman* Court certainly did mention a germaneness inquiry when considering its cases that provide "affirmative support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group," *id.* at 472-473, the critical passage in *Wileman* is the Court's holding that the *Abood-Keller*[2] "test is clearly satisfied in this case because (1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, (2) in any event, the assessments are not used to fund ideological activities." 521 U.S. at 473.

Unlike the Sixth Circuit, Justice Souter and the three Justices who joined him in dissent took this to mean that "a compelled subsidy of speech does not implicate the First Amendment if the speech *either* is germane to an otherwise permissible regulatory scheme *or* is nonideological, *so that each of these characteristics constitutes an independent, sufficient criterion for upholding the subsidy*." *Id.* at 483 n.3 (Souter, J., dissenting) (emphases added). In support of his understanding of the Court's opinion, Justice Souter noted that

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[2] *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Keller* v. *State Bar of Cal.*, 496 U.S. 1 (1990).

the Court had said that " '*in any event*, the assessments are not used to fund ideological activities.' " *Id.* (emphasis in original). Significantly, the Court did not dispute his reading. *See The Supreme Court, 1996 Term—Leading Cases*, 111 Harv. L. Rev. 197, 326 (1997) ("the [*Wileman*] Court stated that compelled speech must be political or ideological to warrant First Amendment protection").

Justice Souter's reading of *Wileman* is correct. This Court emphasized in *Wileman* that there is no "broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities" but rather there is only "a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.' " 521 U.S. at 471 (quoting *Abood*, 431 U.S. at 235). *See id.* at 478 (Souter, J., dissenting) (calling this passage "[t]he nub of the Court's opinion"). Thus, the Court in *Wileman* held that there was no First Amendment issue because "requiring respondents to pay the assessments cannot be said to engender any crisis of conscience." *Id.* at 472.

The rule of *Wileman* is that compelled funding of speech raises no First Amendment issue unless the speech is political or ideological. *See Gerawan Farming, Inc.* v. *Lyons*, 12 P.3d 720, 743 (Cal. 2000) (*Wileman* stands for the proposition that "the First Amendment's right to freedom of speech does not protect commercial speech against compelled funding"). This rule is perfectly sensible as a matter of First Amendment law. Compelled funding of speech imposes "no restraint on the freedom of any[one] to communicate any message to any audience." *Wileman*, 521 U.S. at 469. Nor

is someone compelled to fund speech forced "to engage in any actual or symbolic speech." *Id.* A compelled funding claim is thus far removed from the center of what the First Amendment prohibits, and for that reason a limiting principle is appropriate.

Political speech, unlike commercial speech, is at the very core of the First Amendment. *See R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech * * * [is] regarded as a sort of second-class expression"); *Boos* v. *Barry*, 485 U.S. 312, 318 (1988). Thus, this Court's rule in *Wileman* that compelled funding of speech implicates the First Amendment only when political or ideological communication is funded was a sensible line to draw.

As noted, there is no dispute in this case that the mushroom "advertising is 'nonideological' or 'nonpolitical' in nature." Pet. App. 7a. Under *Wileman*, that should have been the end of the First Amendment inquiry.

II. THE MUSHROOM ACT SATISFIES THE GERMANENESS TEST.

Assuming that the nonpolitical nature of the speech at issue here does not dispose of respondent's compelled funding claim, the Sixth Circuit nevertheless erred when it held that "the mushroom advertising program before us is not 'germane' to any collective program setting prices or supply." Pet. App. 7a.

In *Wileman*, this Court noted that " '*Abood* held that a union could not expend a dissenting individual's dues for ideological activities not "germane" to the purpose for which compelled association was justified.' " 521 U.S. at 473 (quoting *Keller*, 496 U.S. at 13). Here, the purpose of the Mushroom Act is not to collectivize the mushroom industry but to establish a "program of promotion, research, and consumer and industry information designed to" benefit the mushroom industry and expand mushroom markets. 7 U.S.C. § 6101(b). Generic mushroom advertising is not merely germane to that goal, it is the very essence of the program. The court below was wrong to conclude that a promotion program is not germane unless it is part of a larger scheme of industry collectivization.

III. THE SPEECH FUNDED PURSUANT TO THE MUSHROOM ACT IS GOVERNMENT SPEECH AND THEREFORE DOES NOT IMPLICATE THE FIRST AMENDMENT.

Even if *Wileman* were distinguishable from this case for some reason—which it is not—that would not compel the conclusion that the Mushroom Act is unconstitutional. This Court in *Wileman* did not consider whether the speech at issue was government speech and therefore not subject to First Amendment challenge. *See* 521 U.S. at 482 n.2 (Souter, J., dissenting) (citing *Keller*, 496 U.S. at 10-13, and *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment)). In this case, we urge the Court to consider the argument and to resolve the threshold question of the very application of the First Amendment in cases such as this. As we explain, the proper resolution of that question will put to rest First Amendment challenges to the various promo-

tional programs such as that contained in the Mushroom Act.

1. Like private citizens and corporations, government at various levels regularly contributes its voice to the marketplace of ideas. As the Third Circuit has noted:

> Citizens' tax dollars purchase a considerable amount of "government speech." Not only does the government speak on behalf of its citizens when it airs advertisements warning of the dangers of cigarette smoking or drug use, praising a career in the armed services, or offering methods for AIDS prevention, each time the President of the United States meets with a foreign dignitary, or state department officials enter into arms control negotiations, the government is engaging in expressive activities on behalf of everyone. [*United States* v. *Frame*, 885 F.2d 1119, 1131 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).]

See also Block v. *Meese*, 793 F.2d 1303, 1313 (D.C. Cir.) (rejecting view that marketplace of ideas is "one in which the government's wares cannot be advertised") (Scalia, J.), *cert. denied*, 478 U.S. 1021 (1986); *Student Gov't Ass'n* v. *Board of Trustees of Univ. of Mass.*, 868 F.2d 473, 482 (1st Cir. 1989) ("In addition to its role as a regulator, the state plays an important role as a participant in the marketplace of ideas."); *American Jewish Congress* v. *City of Chicago*, 827 F.2d 120, 134 (7th Cir. 1987) ("Speech by the government is common.") (Easterbrook, J, dissenting).

This speech necessarily is paid for by citizens who may or may not agree with the government's message. That fact, however, provides no basis for preventing the

government from taking and communicating a position on issues of public concern, or for any individual to demand the return of his money if he happens to disagree with the government's message.

As the Court explained in *Keller*, 496 U.S. at 12-13:

> Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

See also Lee v. *Weisman*, 505 U.S. 577, 591 (1992) ("the very object of some of our most important speech is to persuade the government to adopt an idea as its own").

Furthermore, as a practical matter, effective government would come to a grinding halt if every person had a right to insist that his money not be used to support programs or positions with which he disagrees. *See Block* v. *Meese*, 793 F.2d at 1313 (discussing the "practical problems of excluding the government from ideological debate"); *see also Penthouse Int'l, Ltd.* v. *Meese*, 939 F.2d 1011, 1015-16 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 950 (1992). *Cf. United States* v. *Lee*, 455 U.S. 252, 260 (1982) ("The tax system could not function if

denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").

Accordingly, the First Amendment simply does not provide a legal basis for objecting to government speech. The First Amendment limits government interference with *private* speech; it does not limit government speech itself. Thus, while the First Amendment ordinarily prohibits the government from regulating speech on the basis of its content, the Court has "permitted the government to regulate the content of what is or is not expressed *when it is the speaker or when it enlists private entities to convey its own message.*" *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (emphasis added). As then-Judge Scalia put it in *Block* v. *Meese*: "The short of the matter is that control of government expression * * * is no more practicable, and no more appealing, than control of political expression by anyone else. * * * [T]he guarantee of freedom of speech does not * * * prevent government from adding its own voice to the many that it must tolerate." 793 F.2d at 1314 (internal quotation omitted). *See also Brown* v. *Palmer*, 915 F.2d 1435, 1445 (10th Cir. 1990) (First Amendment must not be construed to "unduly chill[ ]" government speech), *aff'd*, 944 F.2d 732 (10th Cir. 1991) (en banc).

2. The first factor to consider in determining whether speech is government speech is the obvious one: who is doing the speaking? This Court provided clear guidance on how to answer that question in *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995). That case makes clear that entities such as the Mushroom Council

are government instrumentalities for First Amendment purposes.

In *Lebron*, the National Railroad Passenger Corporation (better known as Amtrak) refused to allow the petitioner to display an advertisement of a political nature on a large illuminated billboard controlled by Amtrak. The question for the Court was whether Amtrak should be considered part of the government for First Amendment purposes. The Court's answer was yes. The Court succinctly stated its holding in the final paragraph of its opinion: "We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id.* at 400.

The three factors that led the Supreme Court to conclude that Amtrak "is part of the Government for purposes of the First Amendment"—(1) creation of the entity by special law; (2) furtherance of governmental objectives; and (3) retention of appointment authority—are all present here and compel the same conclusion with respect to the Council. As to the first factor, the Council was "created by a special statute." *Id.* at 397. *See* 7 U.S.C. § 6104(b)(1)(A) (providing for establishment of the Council). Second, the Council was created "explicitly for the furtherance of federal governmental goals." 513 U.S. at 397. *See* 7 U.S.C. § 6103(a) (Secretary's orders establishing Council are intended to "effectuate the declared policy of § 6101(b)"); *id.* § 6104(c) (powers and duties of the Council). The Act was accompanied by congressional findings explaining

that "the production of mushrooms plays a significant role in the Nation's economy" and that "the maintenance and expansion of existing markets and uses * * * for mushrooms are vital * * * to the agricultural economy of the Nation." *Id.* §§ 6101(a)(2), (5). The purpose of the Act, according to Congress, was "to strengthen the mushroom industry's position in the marketplace," to "maintain and expand existing markets and uses for mushrooms," and to "develop new markets and uses for mushrooms." *Id.* § 6101(b).

These "governmental objectives" (*Lebron*, 513 U.S. at 398) were reaffirmed with the passage of the Federal Agricultural Improvement and Reform Act (the "FAIR Act"). With specific reference to the Mushroom Act, Congress found that "[i]t is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs." 7 U.S.C. § 7401(b)(1). The promotion programs were found "to further the governmental policy and objective of maintaining and expanding markets for the covered commodities." *Id.* § 7401(b)(8)(B). In short, the Mushroom Act was clearly enacted for a public purpose.

As to the third *Lebron* factor, it is clear that the members of the Council serve "under the direction and control of federal governmental appointees." *Lebron*, 513 U.S. at 398. The Secretary of Agriculture appoints all of the members of the Council, *see* 7 U.S.C. § 6104(b)(1)(B), and his order establishes the powers and duties of the Council. *Id.* § 6104(c). Again, this

point was reaffirmed with the passage of the FAIR Act. *See* § 7401(b)(2) (commodity promotion programs are "supervised by the Secretary of Agriculture"); *id.* § 7401(b)(8) (commodity promotion programs are "under the required supervision and oversight of the Secretary of Agriculture").

In sum, there can be little doubt after *Lebron* that the Council is an "instrumentalit[y] created to enable the Secretary of Agriculture to communicate his message that [mushrooms are] good." *Frame*, 885 F.2d at 1131. Therefore, because the speech that United Foods is complaining about is the government's own speech, its First Amendment claim cannot succeed.

3. The Third Circuit in *Frame* ultimately declined to conclude that the speech at issue was government speech because, in its view, "where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group" there is a "coerced nexus" between the message and the individuals who comprise the group. 885 F.2d at 1132. By contrast, that "nexus between the message and individual is attenuated," the court said, "[w]hen the government allocates money from the general tax fund to controversial projects or expressive activities." *Id.* That analysis is fundamentally flawed.

The focus of the government speech inquiry is—and should be—on the entity that conveys the message at issue and on the process through which that message has been formulated. The focus is not—and should not be—on whether or to what extent the message might be ascribed to an individual (other than the speaker) as a result of the "nexus between the individual and the

specific expressive activity." 885 F.2d at 1132. The latter inquiry lacks any firm grounding in established First Amendment doctrine and provides a wholly unworkable rule of decision for distinguishing between government and non-government speech.

The Third Circuit derived its "nexus" analysis solely from footnote 13 of Justice Powell's concurrence in *Abood*, 431 U.S. at 259 n.13, which states:

> Compelled support of a private association is fundamentally different from compelled support of government. * * * [T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests.

See 885 F.2d at 1132-33. The pertinent distinction drawn by Justice Powell was not, as the Third Circuit apparently thought, the "nexus" between the individual and the message to which he objects. Instead, the distinction drawn was between being forced to associate with *private* speech—which is derived from "one segment of the population, with certain common interests"—and with *government* speech—which is derived from the government as "representative of the people." *Abood*, 431 U.S. at 259 n.13.

Thus, in determining whether the speech activities at issue in *Keller* constituted government speech, this Court focused on the entity that conveyed the message—the State Bar Association—and *not*, as would have followed under the Third Circuit analysis, the

"nexus" between the association's members and the message to which they objected. Because the Court concluded that the association was not like a typical government agency or official, who "[is] expected as a part of the democratic process to represent and to espouse the views of the majority of [its] constituents," 496 U.S. at 12, the Court concluded that the messages it conveyed were not government speech. *Id.* at 13.

By contrast, here it follows under *Lebron* that the entity conveying the message to which United Foods objects—the Council—*is* a government instrumentality for First Amendment purposes. *See supra* at 15-17. Moreover, this case is distinguishable in a second, perhaps even more fundamental, respect. Here, unlike in *Keller*, the message being conveyed—mushroom promotion—was formed in the first instance by *Congress* "as a part of the democratic process." 496 U.S. at 12. The Council was created by Congress with the express purpose of conveying that *particular* message to the public. It does so pursuant to precise governmental regulations and subject to the ongoing guidance and control of the Secretary of Agriculture.

No such governmental definition and control characterized the activities of the State Bar in *Keller*. The Court made clear that the messages at issue in that case represented the views of a particular group—the Bar—on a wide and changing array of issues.[3] Here the mes-

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[3] The Bar was alleged to have been engaged in such far ranging—and openly political—activities as "endors[ing] a gun control initiative, disapprov[ing] statements of a United States senatorial candidate regarding court review of a victim's bill of rights, endors[ing] a nuclear weapons freeze initiative, and oppos[ing] federal legislation limiting federal-court jurisdiction over abor-

sage at issue was fixed by the representative of all the people—Congress—and is implemented by the Secretary. Although that message may be beneficial to a particular group—which justifies having them fund its dissemination—there is no doubt that it is the government's message.

The government may—and frequently does—use "private entities to convey a governmental message," or "to transmit specific information pertaining to its own program." *Rosenberger*, 515 U.S. at 833. When it does so, the government speech analysis still applies in analyzing objections to the message or specific information being conveyed by the private entities. *E.g.*, *Rust* v. *Sullivan*, 500 U.S. 173 (1991). But this case does not even involve the enlistment of private entities to convey the government's message. Here, the government's message is being conveyed by *government* bodies created by Congress specifically for that purpose and placed under the direct supervision of *government* officials like the Secretary. *See supra* at 15-17. In these circumstances, it simply defies common sense to conclude that this case does not involve government speech.

Had Congress elected to fund the activities under the Mushroom Act with taxpayer dollars, there would be no question that the program's speech was government speech. Simply because Congress made the decision to defray the program's cost by imposing what amounts to a modest user fee on those "who most directly reap the benefits of the programs," 7 U.S.C. § 7401(b)(2)—and

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tions, public school prayer, and busing." 496 U.S. at 15. The Act in this case expressly prohibits spending for such political activities, 7 U.S.C. § 6104(h), and limits permissible speech activities to commercial advertisements promoting mushrooms.

who as a group have voted to fund the program—does not change the essential character of the speech. It remains the government's message, with the content specified by Congress and articulated under the guidance and control of the Secretary.

This is a far cry from a case in which the government attempts to compel adherence to its own message, as was the case in *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943), where students were faced with expulsion and prosecution for failing to participate in the Pledge of Allegiance, or *Wooley* v. *Maynard*, 430 U.S. 705 (1977), where motorists were required to bear on their own vehicle license plates an ideological state motto they found morally objectionable. The respondent in this case faces no such ideological dragooning. The marketing order simply requires it to pay a user fee; it neither "compel[s] [it] to utter what is not in [its] mind," *Barnette*, 319 U.S. at 634, nor makes it "the courier for [the government's] message." *Wooley*, 430 U.S. at 717. That is, no one has asked respondent to express *its* support of mushroom promotion, as in *Barnette*, or to bear such a message on *its* property, as in *Wooley*. For the government to compel political or ideological speech from the lips of a reluctant entity is worlds apart from compelling that entity to contribute financially to support government-supervised commercial speech, when that speech directly benefits its own commercial interests. *See NAACP* v. *Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990) ("Government communication is legitimate so long as the government does not abridge an individual's 'First Amendment right to avoid becoming the courier for such message.' ") (quoting *Wooley*, 430 U.S. at 717).

Justice Harlan made the same point in *Lathrop* v. *Donohue*, 367 U.S. 820, 858 (1961) (concurring in the judgment):

> What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to [an organization] fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor.

Society frequently calls upon its members to pay taxes, dues, or other assessments to support various organizations and entities both governmental and non-governmental. But no one thinks that everyone who makes such a payment thereby endorses to the last jot and tittle the agenda of the recipient, because "the connection between the payment of an individual's dues and the views to which he objects is factually so remote." *Id.* at 859.

In sum, the speech at issue in this case is speech by a Council established pursuant to federal law to achieve defined governmental objectives. The members of the Council are appointed by a government officer, and its activities are subject to his direction and control. The message that is conveyed by the Council is the government's message. The fact that it is funded by assessments on those who benefit most directly from the government program—and who have by a vote elected to fund such a program—does not make the speech the forced speech of someone else. It remains government speech, and the fact that some of those compelled to

support it—who are free to speak their own mind on the subject—may object to the government's message does not give rise to a First Amendment violation.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
Petitioners,

v.

UNITED FOODS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* THE WESTERN MUSHROOM MARKETING ASSOCIATION, THE WASHINGTON APPLE COMMISSION, THE UNITED FRESH FRUIT AND VEGETABLE ASSOCIATION, THE CALIFORNIA AGRICULTURAL ISSUES FORUM, AND THE NORTHWEST HORTICULTURAL COUNCIL IN SUPPORT OF PETITIONERS

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BRIEF *AMICI CURIAE*

Pursuant to Rule 37.3 of the Rules of the Supreme Court of the United States, the Western Mushroom Marketing Association, the Washington Apple Commission, the United Fresh Fruit & Vegetable Association, the California Agricultural Issues Forum, and the Northwest Horticultural Council respectfully submit this brief *Amici Curiae* in support of the Petitioner. This brief is presented with the consent of all parties. The required letters of consent are filed with this brief.[1]

INTEREST OF THE *AMICI CURIAE*

Amici submit this *amici curiae* brief in support of petitioner Secretary of Agriculture. Although this Court has found that generic agricultural research and promotion programs funded by mandatory assessments do not violate the First Amendment, the court below invalidated the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101, *et seq.* ("Mushroom Promotion Act") on the ground that it did not contain "heavy regulation . . . controlling price, supply and quality." *United Foods, Inc., v. United States*, 197 F.3d 221, 224-25 (6th Cir. 2000). *Amici* have vital interests in this matter because they are involved with mushrooms or other commodities that benefit from and participate in research and promotion programs authorized by federal and state laws that contain varying amounts of regulation, either within the authorizing legislation or affecting the commodity and its distribution. The *United Foods* standard regarding the extent of regulation to justify mandatory assessments to support the programs either directly or indirectly impacts these *Amici*.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party to these proceedings authored, in whole or in part, this *Amicus Curiae* Brief. No other entity or person, aside from *Amici*, made any monetary contribution for the preparation or submission of this brief to this Honorable Court.

The Western Mushroom Marketing Association is a California nonprofit corporation whose purpose is to promote the sale and consumption of mushrooms. Its members are located in California, Colorado, Nevada, Oregon, Utah and Washington and range from small, family operations, growing 2-3 million pounds of mushrooms a year, to large corporate growers who grow approximately 50 million pounds of mushrooms a year. The members of this association grow mushrooms that are subject to the Mushroom Promotion Act that is the subject of the present action. Association members will be directly affected by the instant action.

The Washington Apple Commission[2] is a mandatory producer-funded agricultural commodity research and promotion program analogous to that at issue in the instant case. It operates under authority granted by the Washington Legislature. As such, it is uniquely situated to assist the Court in understanding the scope and structure of these programs and the importance of these programs to the agricultural economy.

The United Fresh Fruit & Vegetable Association is a national trade association for the fruit and vegetable industry. Its members include growers, packers, shippers and distributors of produce. The association's members produce and distribute agricultural commodities that are the subject of generic research and promotion programs that are analogous to the program at issue here.

The California Agricultural Issues Forum is an association of California commissions and boards that conduct generic agricultural research and promotion programs that are

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[2] Created in 1937 as the Washington State Apple Advertising Commission, Wash. Rev. Code § 15.24.010, the Commission is popularly known as the Washington Apple Commission.

analogous to that at issue in the instant matter.[3] The California Agriculture Issues Forum was formed for the purpose of creating an environment in which farmers can continue to compete and profitably produce food. The Northwest Horticultural Council is an association of marketing boards conducting programs similar to the program of the Mushroom Council, which is at issue here, as well as growers and shippers involved in those programs.[4] The Northwest Horticultural Council was formed with the broad purpose of addressing problems common to the Northwest produce industry.

These *Amici* are well situated to assist the Court in understanding the scope and structure of these programs and the importance of these programs to the agricultural economy. Accordingly, this brief is primarily devoted to a discussion of the types of activities engaged in by research and promotion programs, and the importance of these activities to the producers, consumers and the economy of the United States.

SUMMARY OF ARGUMENT

1. Mandatory research and promotion programs were enacted for the purpose of regulating agricultural commodities and, in accordance with *Wileman*, the First Amendment is not implicated by the mandatory assessments to support the activities of the Mushroom Council. Because the amount of regulation surrounding a generic advertising and promotion program does not change the regulatory

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[3] The members of the California Agricultural Issues Forum represent California growers of avocados, cantaloupes, cherries, citrus, peaches, kiwifruit, melons, pears, plums, prunes, raisins, strawberries, and table grapes.

[4] The Northwest Horticultural Council represents the interests of growers and shippers of apples, Bartlett pears, sweet cherries, winter pears, and other tree fruits grown in Idaho, Oregon and Washington.

purpose and effect of the program, the Sixth Circuit erred when it distinguished the mushroom order on the basis that it was not regulation and held it unconstitutional.

2. Generic agricultural research and promotion programs supported by mandatory assessments exist in many forms and cover a wide range of agricultural commodities. The activities engaged in by these programs share common goals: stabilizing the agricultural economy, promoting agricultural products, protecting consumer health, and preventing waste. These programs benefit producers, consumers, and the agricultural economy.

ARGUMENT

A. THE SIXTH CIRCUIT ERRED WHEN IT HELD THAT THE COURT MUST ASSESS THE REGULATORY SCHEME TO DETERMINE WHETHER IT CONTAINS AN APPROPRIATE NUMBER OF REGULATIONS

Amici agree with the solicitor general: that mandatory research and promotion programs were enacted for the purpose of regulating agricultural commodities; that the First Amendment is not implicated unless a research and promotion program restrains the freedom of a producer to communicate any message to any audience, compels a person to engage in any actual or symbolic speech, or compels the producer to endorse or finance any nongermane political or ideological views; and that without these restrictions or compulsions, assessments to support a generic agricultural research and promotion program are not speech. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469-70 (1997).

Because the amount of regulation surrounding a generic advertising and promotion program does not change the regulatory purpose and effect of the program, the Sixth Circuit erred when it distinguished the mushroom order on the basis that it was not regulation. As with the tree fruit

orders in *Wileman*, the mushroom research and promotion program is demand-side regulation of the agricultural economy. *See United States v. Frame*, 885 F.2d 1119, 1126 (3d Cir. 1989). Research and promotion programs were passed to support and stabilize the agricultural economy by increasing demand for agricultural products. That these promotional programs use speech to achieve their regulatory ends does not prevent them from constituting economic regulation. Nor does the addition of price or supply controls alter the basic regulatory nature of these programs, even though they are more intrusive than mandatory assessments.

All of these generic research and promotion programs are consistent with the *Wileman* Court's conclusion that these program are "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress." *Wileman*, 521 U.S. at 477. Therefore, Congress, state legislatures, government officials and market participants are correct in concluding "that such programs are beneficial." *Id.*

B. AN EXAMINATION OF RESEARCH AND PROMOTION PROGRAMS SHOWS THAT THEY ARE ECONOMIC REGULATION THAT PROMOTE THE HEALTH OF THE AGRICULTURAL ECONOMY

1. Research and Promotion Programs Exist in a Wide Range of Forms to Best Promote a Wide Range of Products

Generic agricultural research and promotion programs supported by mandatory assessments of the producers of the products affected, exist in many forms and cover a wide range of agricultural commodities. As of 1993, more than three hundred mandatory commodity research and promotion

programs were operating throughout the United States.[5] The combined budgets of these programs in 1993 was approximately $700 million.[6] The farm revenue derived from the commodities subject to the programs is in excess of $100 billion.[7]

These programs take a variety of forms and are created in a variety of ways. They may be authorized by statute granting federal or state secretaries of agriculture broad general authority to establish marketing programs under predetermined circumstances.[8] In other cases, the programs are created for specific commodities directly by act of the legislatures.[9] Under both circumstances, the statutes establish the structure of the program and typically direct the secretary to put the proposed program to an industry vote.[10] If the referendum establishes that the program has sufficient support in the industry, the program will be authorized. Once created, the program will typically include a board consisting of producers, handlers, or both, operating under government oversight.[11] The programs often include provisions for

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[5] O.D. Forker & R.W. Ward, *Commodity Advertising: The Economics and Measurement of Generic Programs* 81 (New York, Lexington Books 1993).

[6] *Id.*, 102-03, Table 5-1.

[7] W. Kinnucan, *Economics of Mandated Commodity Programs: An Overview and Guide to the Literature* 2 (1995).

[8] *Compare* The Agricultural Enabling Act of 1961 (Wash Rev. Code § 15.65) *and* The California Marketing Act of 1937 (Cal. Food & Agric. Code § 58601, *et seq.*) *with* Mushroom Promotion, Research and Consumer Information Act of 1990, as amended, 7 U.S.C. §§ 6101-6112; Wash. Rev. Code § 15.24.010, *et seq.* (Washington Apple Commission), Idaho Code § 22-1201, *et seq.* (Idaho Potato Commission); and Cal. Food & Agric. Code § 68001, *et seq.* (California Kiwifruit Commission).

[9] *See, e.g.*, Wash. Rev. Code § 15.24.010; Idaho Code § 22-1202.

[10] *See, e.g.*, 7 U.S.C. § 6105; Cal. Food & Agric. Code § 68091.

[11] *See, e.g.*, 7 U.S.C. § 6104; Cal. Food & Agric. Code §§ 68051-68052.

termination through a variety of mechanisms, including regular referenda, petition processes through which producers or handlers can force an interim referendum, and the secretary's individual power to terminate or suspend a program.[12]

Whether authorized by general statute, a commodity specific act of Congress or a state legislature, the programs are empowered to engage only in specific limited activities that vary from program to program. These activities typically involve: generic promotion to maintain and expand existing markets and open new ones; production research to increase efficiency and develop new and value added uses for the commodity; market research to identify opportunities and guide the promotion efforts; and, dissemination of consumer education information regarding handling requirements and nutritional qualities.[13]

2. The Activities of These Programs Achieve the Purpose Underlying Their Enactment: Promoting Agriculture, Protecting Consumer Health and Preventing Waste

All of the activities engaged in by these programs share common goals: stabilizing the agricultural economy, promoting agricultural products, protecting consumer health, and preventing waste. For example, in enacting the Agricultural Marketing Agreement Act of 1937 (AMAA), ch. 296, 50 Stat. 246, as amended, 7 U.S.C. § 601 *et seq.*, Congress declared these programs necessary to prevent "disruption of the orderly exchange of commodities in interstate commerce [which] impairs the purchasing power of farmers and destroys the value of agricultural assets which

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[12] *See, e.g.*, 7 U.S.C. § 6105; Cal. Food & Agric. Code, §§ 68132, 68133.

[13] *See, e.g.*, 7 U.S.C. § 6104; Wash. Rev. Code § 15.24.070; Idaho Code § 22-1207; and Cal. Food & Agric. Code § 68081.

support the national credit structure." [14] In enacting the Agriculture Improvement and Reform Act of 1996, Congress further stated that "[t]he central congressional purpose underlying each commodity promotion law has always been to maintain and expand markets for the agricultural commodity covered by the law, rather than to maintain or expand the share of those markets held by any individual producer or processor." [15]

A review of the state authorized programs reveals that they too were enacted for an economic purpose. In adopting the act authorizing the Washington Apple Commission, the Washington Legislature provided that the Commission was necessary, in part, because stabilizing the apple industry, enlarging its markets, and increasing of consumption of apples are necessary "to stabilize and protect the apple industry of the state" and "to assure the payment of taxes to the state and its subdivisions, to alleviate unemployment within the state, and increase wages for agricultural labor." [16]

In the legislative enactment creating the Idaho Potato Commission, the State of Idaho cited a similar desire to make its industry more efficient and competitive in an expanding agricultural markets. The legislature explained that: " "[e]conomic" waste is being fostered in the potato industry of the state of Idaho by the lack of proper advertising and dissemination of information necessary for the development and promotion of the sale of potatoes grown in the state of Idaho." [17] Therefore, Idaho created the Potato Commission to expand the markets and increase consumption of potatoes.[18]

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[14] 7 U.S.C. § 601.

[15] The Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 501 (b) (2), 110 Stat. 888.

[16] Wash. Rev. Code § 15.24.900(1), (6).

[17] Idaho Code § 22-1201.

[18] *Id.*

A nearly identical concern was expressed by the California Legislature in 1937 when it declared these programs necessary to "alleviate conditions which result in an unreasonable and unnecessary economic waste of the agricultural wealth of this state" and "prevent producers from retaining a fair return from their labor, their farms and the commodities which they produce." [19] The Legislature underscored this intent and reaffirmed the need for these programs in 1995 with the passage of Assembly Bill 1563 (1995 Cal. Stat. 727), which states that these programs "[a]re now more necessary and valuable than ever before as a result of declining support from the federal government and the increasing competition attributable to the global marketplace." [20]

These programs were also enacted to protect consumer health by ensuring the availability of fresh fruits, vegetables, meats and dairy products.[21] Marketing programs concern "not only the economic welfare but the health of the public in general." [22]

A well considered governmental plan to provide benefits to the nation and states, their people, and their economies, through expanding aggregate demand for, and consumption of, agricultural commodities underlies all of these programs. Congressional and legislative pronouncements regarding the need and desirability of mandatory commodity promotion and research programs, as the vehicle for implementing that plan,

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[19] Cal. Food & Agric. Code § 58651.

[20] Cal. Food & Agric. Code § 63901.

[21] *See, e.g.*, 7 U.S.C. § 6101(a)(1) (mushrooms); Cal. Food & Agric. Code §§ 58652, (The California Marketing Act of 1937), 61801 (milk), 65500 (table grapes); Wash. Rev. Code § 15.24.900 (apples).

[22] *Golden Cheese Co. v. Voss*, 230 Cal. App. 3d 547, 562, 281 Cal. Rptr. 587 (1991); *see also Nebbia v. People of State of New York*, 291 U.S. 502, 516-17 (1934) (milk).

echoes throughout the statutory enactments creating these programs.[23]

3. These Programs Promote the Agricultural Economy

One of the main activities engaged in by these marketing programs is promotion intended to increase demand in order to stabilize and absorb production. Promotion encompasses many types of activities, including international marketing, food service promotion, consumer education, and retail merchandising. It is well established that advertising increases demand for the product advertised.[24] Accordingly, advertising is one of the primary tools employed by these programs. Generic advertising has been described as "the cooperative effort among producers of a nearly homogeneous product to disseminate information about the underlying attributes of the product to existing and potential consumers for the purpose of strengthening demand for the commodity."[25]

Commodity marketing programs enable producers to pool their funds to promote their products.[26] This pooling of funds is necessary to generate benefits to the industry as a whole. For example, suppose that returns from a generic advertising program are $10 for each $1 spent and there are 500 equally small producers of a commodity. If an individual producer spends $10, the benefits to the industry will be $100, but since the benefits are distributed equally based on the amount sold, the individual producer gets a return of only

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[23] *See, e.g.*, 7 U.S.C. § 6101; Wash. Rev. Code § 15-24-010; Idaho Code § 22-1201; Cal. Food & Agric. Code §§ 68001-68005, inclusive.

[24] *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342 (1986); *see also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 569 (1980).

[25] Forker & Ward, *supra*, at 2.

[26] *Id.* at 10.

$.20 for the $10 expenditure. Thus, the use of assessments from all producers of a commodity is necessary to ensure that the cost for the benefit, which is equally shared, is also equitably distributed. The sharing of costs through mandatory assessments avoids the "free rider" problem, which the U.S. Supreme Court found to be a vital government interest in the agency shop context.[27] As two noted commentators have stated:

> Commodity checkoff programs are a direct outgrowth of the potential free-rider problem. Commodity industries recognize the need to advertise their products but also recognize the need for everyone who benefits to pay their share of the program costs.

Forker & Ward, *Commodity Advertising*, *supra*, at 10.

The programs do more than advertising. Among other activities, these programs support research, either directly with their own staff or by contract, ranging from research regarding the commodities' health benefits to production methods that reduce pesticide use. These programs are also active in foreign marketing, such as opening new markets for domestic products and ensuring that established markets remain accessible. (*See* discussion regarding the California Table Grape Commission, *infra*, at C.3.)

Several recent econometric studies have been conducted to determine whether these programs provide measurable benefits for the agricultural economy. These peer-reviewed studies have demonstrated that the efforts of marketing boards and commissions have benefited producers and the agricultural economy. For example, a November 1997 study conservatively estimates net industry returns for the California Table Grape Commission's promotion program at

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[27] *See, e.g., Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991).

five dollars for every dollar spent.[28] This shows that the programs can be very effective in terms of return to the growers for each promotional dollar spent, benefiting all growers by increasing demand for their products. Depending on the supply of the products, the increased demand may result in a higher price for a given harvest, or it may result in increased consumption at a constant or higher price. In either case, increased demand benefits an industry by increasing revenues.

Furthermore, studies indicate that the agricultural industry is negatively impacted when these programs are discontinued. In California, the almond promotion program was suspended from 1994 through 1997, providing a natural experiment for assessing the impact of the termination of these programs. A study of this period estimated that the accumulated loss to almond growers from the suspension was between $90 and $234 million dollars.[29]

C. THESE PROGRAMS HAVE UTILIZED MEANS SUITED TO THE NEED OF THEIR INDUSTRIES TO PROMOTE THE AGRICULTURAL ECONOMY BY INCREASING DEMAND

These programs are best understood in light of the types of activities they engage in and the benefits these activities bring to the industry. They go beyond just advertising. Their activities include programs for foreign marketing, opening new markets, ensuring that established markets remain accessible, helping to maintain a balance between production

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[28] Julian M. Alston, et al., *The California Table Grape Commission's Promotion Program: An Evaluation*, 77 (University of California, Giannini Monograph, No. 43, 1997).

[29] John M. Crespi & Richard J. Sexton, *Have Expenditures to Advertise California Almonds Been Effective?* 3 U.C. Davis Agric. & Resource Econ. Update 8 (2000).

and demand, and providing information that benefits the buying public and the producers. The following examples show how some promotion programs have used these means to provide the greatest benefit to their industry.

1. The California Walnut Commission and the California Walnut Marketing Board: Research and Promotion Working Together to Increase Consumption

Walnuts provide an example of how research and promotion can work together to increase consumption of a commodity.[30] In 1993, the California Walnut Commission [31] sponsored a study regarding the health benefits of walnuts that was published in the *New England Journal of Medicine*, showing that consumption of walnuts reduces blood

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[30] Walnuts are promoted through the joint efforts of the Walnut Marketing Board and the California Walnut Commission. The Walnut Marketing Board is a federal marketing order issued pursuant to the AMAA. 7 C.F.R. Part 984. The marketing order governs walnuts grown in California and promotes walnut use through research, promotion and education. *Id.*; *Walnut Marketing Board/California Walnut Commission*, *at* http://www.walnut.org/wmb.html. California Walnut Commission is authorized by statute. Cal. Food & Agric. Code § 77001, *et seq.* The Commission has a broad mandate regarding research and other activities but is authorized to engage in foreign marketing to expand the export markets for California-grown walnuts. Cal. Food & Agric. Code §§ 77090, 77095.

[31] The cotton industry has realized similar results through integrating research into its promotion programs. The Cotton Board conducts research and promotion programs under an order issued pursuant to the Cotton Research and Promotion Act, 7 U.S.C. § 2101, *et seq.* Industry funded research efforts undertaken by the Cotton Board turned around what many believed to be a dying industry. In the 1970's synthetic fabrics dominated the marketplace to the point that by 1975, cotton's retail share of the apparel and home fabric market was only 34%. By 1988, that share had increased to 51%, largely as a result of promotion based on research into fabric production. Forker & Ward, *supra*, at 122.

cholesterol levels.[32] Subsequent studies have confirmed these findings, indicating that eating walnuts can lessen the risk of heart disease by as much as 11%.[33]

Not surprisingly, the results of these studies have become a centerpiece in the program's marketing strategies, and the dissemination of these results have improved consumers' perception of walnuts as not only good to eat, but also good for their health. In July 1993 market research conducted throughout the United States revealed the significant impact of this research. In telephone interviews conducted in December 1992, 39% of those contacted described walnuts as being high in fat. Six months later, and three months after publication of the *New England Journal of Medicine* article, only 27% continued to believe walnuts were high in fat and fully 68% associated positive health attributes with walnuts.[34]

Given this trend, it is not surprising that none of those interviewed in December 1992 (before the article was published), who indicated they were buying more walnuts than they had in the past, listed health as a reason for the increase. By comparison, in June 1993 (after the study was published) 16% gave health as a reason for their increased consumption.[35]

These successful efforts on behalf of California's walnut producers provide an excellent example of how a mandatory commodity promotion and research program produced a significant consumer benefit and at the same time developed a powerful marketing tool to boost overall demand for the benefit of producers.

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[32] Joan Sabate et al., *Effects of Walnuts on Serum Lipid Levels and Blood Pressure in Normal Men*, New Eng. J. Med. (March 4, 1993).

[33] Walnut Marketing Board/California Walnut Commission, *Walnut Nutrition/ Nutraceutical Updates, at* http:/www.walnut.org/ loma.html.

[34] *California Walnut Tracking Study for USA*, (The Rose Organization, July 1993).

[35] *Id.*

2. The Washington Apple Commission: Geographic Identity Benefiting the Growers and the Agricultural Economy

The Washington Apple Advertising Commission, popularly known as the Washington Apple Commission, provides an example of how a program can assist in creating and maintaining a geographic identification with a product that benefit producers, the industry, and the overall agricultural economy in a state.

The Washington Apple Commission was created in 1937, when the act creating the Washington State Apple Advertising Commission was signed into law.[36] The Act requires the Washington Apple Commission to "conduct a comprehensive and extensive research, advertising and educational campaign as continuous as the crop, sales and market conditions reasonably require."[37] As early as 1947, independent surveys indicated that nearly 25% of the homemakers sampled said they preferred Washington apples for eating raw, and 16% said that they preferred Washington apples for cooking. Those surveyed did not mention apples grown in any other state or region.[38] Consumer recognition of Washington apples has continued to grow since the early days of the Commission. In interviews conducted in 1994 in Los Angeles, Washington, D.C. and Houston, nearly 50% of consumers interviewed perceived Washington apples as being more attractive, of better quality and crunchier than other apples. Three-quarters of those surveyed said that they were more likely to buy Washington apples in the future.[39]

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[36] Wash. Rev. Code § 15.24.010, *et seq.*; *see also* Washington Apple Commission, *About Us*, *at* http://www.bestapples.com/about-us.

[37] Wash. Rev. Code § 15.24.080.

[38] Washington Apple Commission, *Consumers Choose Washington*, *at* http://www.bestapples.com/apple-info/facts/consumers.asp.

[39] *Id.*

In light of these efforts, it is not surprising that the apple industry is a major source of revenue in Washington. Washington is the nation's largest apple producer. More than half of all apples grown domestically for fresh eating come from Washington. Washington is also the leading apple producing state in terms of total crop, growing more than 40% of the domestically produced apples.[40] Further, apples are Washington's most important agricultural commodity, with a value of $849.6 million in 1999.[41]

Econometric studies of the Apple Commission's programs confirm that the Apple Commission plays a major role in the health of this industry. The activities of the Washington Apple Commission between 1986 and 1991 produced a 12.9% higher market price than would have been realized without the program. This accomplishment represented a return of $133.76 million on an investment of $17.5 million, or $6.63 per producer dollar invested.[42] A recent study of the Washington Apple Commission's efforts to promote Fuji apples concluded that a $1.00 investment in the promotion of Fuji apples generates more than $6.00 in income per producer.[43]

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[40] Washington Apple Commission, *Washington Provides More Than Half of U.S. Fresh Apples, at* http://www.bestapples.com/ apple-info/facts/more.asp; Washington Agricultural Statistics Service, *Washington's Rank in the Nation's Agriculture, at* http://www.nass.usda.gov/wa.

[41] Washington Agricultural Statistics Service, *Top Forty Agricultural Commodities, Wa. at* http://www.nass.usda.gov/wa.

[42] O.D. Forker and R.W. Ward, *Commodity Checkoff Programs. A Self-Help Marketing Tool for the Nation's Farmers? Choices*, Fourth Quarter, 1993, 24.

[43] Timothy J. Richards & Paul M. Patterson, *New Varieties and the Returns to Commodity Promotion: The Case of Fuji Apples*, Agric. & Resource Econ. Rev., No. 29(1), 10-23 (Apr. 2000).

3. The California Table Grape Commission: Expanding the Sales of Table Grapes World-Wide

The California Table Grape Commission is an example of how a generic agricultural research and promotion program can expand and maintain markets for the benefit of its constituent growers. The Ketchum Act,[44] the statute authorizing the California Table Grape Commission, was passed at a time when the table grape industry was in serious decline. In 1968, when the Commission was formed, domestic per capita consumption of fresh table grapes had slipped to a twenty year low of approximately 1.7 pounds. In 1971, three years after the Commission was established, this trend reversed. By the early 1990s, with the Commission's assistance, domestic per capita consumption had more than tripled to approximately 6.5 pounds.[45]

In addition to achieving great success with its domestic promotional programs,[46] the California Table Grape

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[44] Cal. Food & Agric. Code §§ 65500 - 65675.

[45] Alston, *supra*, at 9-10.

[46] *Id.* at 77 (a study conservatively estimated that every dollar the Commission spent on promotion reaped a five dollar return for the industry).

The Table Grape Commission's participation in research programs has also benefited the industry. As just one example, since its inception approximately thirty years ago, the Commission has devoted more than $1.5 million on research to develop Integrated Pest Management and reduced-risk strategies for pesticide applications. *See* California Table Grape Commission, *Total Research Projects Index, 1972-2000, at* www.tablegrape.com/rev99/viticulture/ rsrcharchive/default.htm. These research efforts have been so valuable that in 1997, the Commission was the recipient of the "IPM Innovator" award from California's Department of Pesticide Regulation. *In Brief—Table Grape Commission Receives 'Innovator' Award*, Fresno Bee, Nov. 20, 1997, at C1; Richard T. Estrada, *Integrated Pest Control Finally Hot*, Modesto Bee, Nov. 14, 1997, at D1.

Commission has provided benefits through opening and expanding foreign markets. The Commission has been involved in export promotion since the late 1970s, with positive results. The trend in the quantity of table grapes exported was flat until 1987. Since then, exports have grown from between 200,000 and 250,000 pounds per year to over 400,000 pounds per year in the 1990s.[47] These results were achieved in part through the Commission's promotional efforts. Lack of consumer awareness in foreign markets has been a recurring barrier to the sale of California table grapes. Therefore, the Commission engages in promotional efforts to familiarize foreign consumers with table grapes, highlighting table grapes' nutritional value and other characteristics that increase their desirability. The Commission now has active promotion programs in more than twenty countries.[48] A study conducted by the United States Department of Agriculture (the "USDA") showed that the Commission promotion in targeted foreign markets resulted in a 27% increase in sales by volume. By comparison, foreign sales into non-targeted markets only increased by 9%.[49]

Another example is the opening of the China market. In an advisory capacity to the USDA, the Commission played an integral part in the negotiations that resulted in China opening its market to California table grapes. The Commission's efforts went beyond assisting in negotiations, and extended to implementing programs that were key to obtaining China's agreement. Before these efforts, China closed its borders to table grapes because of concerns over pests such as the Mediterranean fruit fly. The trade agreement with China required that the USDA perform monitoring to alleviate these

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[47] Alston, *supra*, at 57.

[48] *Id.* at 15.

[49] USDA, Horticultural & Tropical Products Division, *Grapes, World Production, Trade Statistics, & Market Information, at* http:/www.fas.usda.gov/htp/horticulture/grapes.html.

concerns, including additional Medfly trappings. The Commission agreed to implement and pay for the required programs. As a result of these efforts, in 1997 fresh table grapes became the first California commodity to gain access to Mainland China.[50] Similarly, the Commission assisted the USDA Foreign Agricultural Service in convincing the Korean government to establish a sulfur dioxide tolerance on table grapes. This paved the way for increased shipments of California table grapes to Korea, a significant new market for table grapes.[51]

The Table Grape Commission plays an active role in maintaining markets in Mexico. One of the difficulties in shipping to Mexico had been Mexico's complicated labeling requirements and inconsistent enforcement of those requirements. In large part due to the Commission's efforts, the Mexican labeling regulations were changed to impose the labeling requirements upon the Mexican importer rather than the United States shipper-exporter of table grapes. Partially as a result of the Commission's efforts, Mexico is now one of the largest markets for California table grapes.[52]

Further, in addition to the benefits achieved in Mexico, the California Table Grape Commission's promotional efforts in the Pacific Rim indicates that every $1 spent on export promotion generates benefits of $2, and that the benefit may be as high as $11 for every $1 spent.[53]

Several recent studies show that the Commission's efforts benefit California table grape growers in particular, and the California agricultural economy as a whole. A November

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[50] *See* Alston, *supra*, at 15.

[51] *Id.*

[52] *Id.*; *see also* The California Table Grape Commission, *Global Marketplace*, *at* http://www.tablegrape.com/index.htm.

[53] *Id.* at 78.

1997 study conservatively estimates net industry returns for the California Table Grape Commission's promotion program as five dollars for every dollar spent. The mid-range estimates provided by the study suggest that an extra one dollar promotion would generate benefits of over twenty dollars.[54]

4. The California Avocado Commission: Using Innovative Programs to Benefit the Industry

The California Avocado Commission[55] provides an example of how these programs use innovative programs to promote their commodities.

The Avocado Commission is also using new technologies to reach the avocado consumers. The Commission launched its web site, www.avocado.org in 1994. Since then, the traffic at the site has grown from a few visitors a day to more than 700,000 visitors a month.[56] The Commission uses this web site to reach out to avocado consumers. It sends email updates to the more than 24,000 people across the country who have registered to receive more information on California avocados. To encourage consumers to expand their use of avocados, it teamed up with gourmet restaurants in California to provide recipes that use avocados.[57] It has also launched a "Recipe Subscriber Program," a free service that emails a new avocado recipe to its subscribers each

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[54] *Id.* at 77.

[55] The California Avocado Commission is a research and promotion program created by the California legislature. Cal. Food & Agric. Code § 67001, *et seq.*

[56] The California Avocado Commission, *Trade News: Web Site Takes Avocado Marketing Into Cyberspace*, *at* http:/www.avoinfo.com/marketing/mark424.shtml.

[57] The California Avocado Commission, *Trade News: California Restaurants from North to South . . . , at* http://www.avoinfo.com/consumernews/cons72.shtml.

month.[58] The Commission has found that these efforts, together with other technologies such as database marketing, have increased available information regarding consumers' needs and enabled it to improve and target its promotion programs.

The California Avocado Commission's programs have had impressive results. On a short term basis, returns have typically averaged $5 to $6 for each dollar spent. The short term success of this program has caused new producers to enter the avocado industry, thereby increasing supply. The growth in the industry benefits the consumer by decreasing the price of avocados and benefits the state's economy as a whole by increasing overall revenues. Even though increased supply tends to decrease the price of avocados, the long term benefits to the individual producer have also been substantial. The average benefit-cost ratio per year over a 34-year period between 1961 and 1995 is $1.89 to $1, and the long-run ratio is $1.78 to $1. Further, if only the producers' share of the cost for the program funded through mandatory assessments is counted, the long-run ratio averages $2.84 to $1 across the 34 years.[59]

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[58] *Id.*

[59] Hay E. Carman & R. Kim Craft, *An Economic Evaluation of California Avocado Industry Marketing Programs* 1961-1995 96 (University of California, Monograph No. 344, July 1998).

CONCLUSION

Wileman establishes that unless a mandatory generic agricultural research and promotion program restrains the freedom of a producer to communicate any message to any audience, compels a person to engage in any actual or symbolic speech, or compels the producer to endorse or finance any nongermane political or ideological views, it is a species of economic regulation that does not violate the First Amendment. *Wileman*, 521 U.S. at 469-70. Nonetheless, in *United Foods*, the Sixth Circuit distinguished the mushroom order on the basis that it was not regulation. In so doing, the Sixth Circuit erred.

Mandatory research and promotion programs are economic regulation that promote agriculture and stabilize markets by increasing demand for agricultural commodities, showing that the legislature did not err when it concluded that these programs are beneficial. Accordingly, as in *Wileman*, the Court should defer to the determination of Congress, government officials and market participants, and reverse the decision below.

Respectfully submitted,

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UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,

Petitioners,

v.

UNITED FOODS, INC.,

Respondent.

**On Writ Of Certiorari
From The United States Court Of Appeals
For The Sixth Circuit**

BRIEF OF *AMICI CURIAE* STATES OF CALIFORNIA, COLORADO, DELAWARE, MICHIGAN, NEBRASKA, NEVADA, OHIO, PENNSYLVANIA, AND WASHINGTON IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

The States of California, Colorado, and Ohio, through their Attorneys General, submit this *amicus curiae* brief in support of petitioner Secretary of Agriculture. The court below invalidated a federal statute that relies on mandatory assessments on the sale of mushrooms to carry out a program for the support of markets for mushrooms through promotion, research, and consumer information programs.[1] It distinguished this Court's jurisprudence upholding such programs on the basis that the mushroom program here is not embedded in a comprehensive program of non-speech regulations, including quantity and price controls. *Amici* have vital interests in this matter because they have analogous programs that rely on assessments imposed upon the sale of agricultural commodities to pay for generic commodity promotion, yet do not broadly collectivize marketing.

Through their comprehensive oversight of agricultural commodities, the *amici* states are particularly well situated to address those interests. This brief is therefore devoted primarily to a discussion of the fundamental economic regulatory role played by such programs.

SUMMARY OF ARGUMENT

1. The Sixth Circuit erred in holding that requiring a grower to help fund a commodity promotional program

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[1] Mushroom Promotion, Research and Consumer Information Act, 7 U.S.C. §§ 6101-6110. *See* § 6101(b).

violates the First Amendment unless the program also restricts other aspects of marketing, notably through price and quantity controls. Whether or not non-speech-related restraints are imposed *in addition* to the requirement to pay for speech-related services should not affect the First Amendment analysis. For nearly 50 years this Court has approved agency shop legislation, where the only requirement is to pay a union for speech services in the form of collective bargaining.

2. Government programs to stabilize farm income began early in the last century, because agriculture is inherently subject to economic instabilities. Agricultural products are homogeneous, perishable, and seasonal; demand is generally inelastic; production responds slowly to change in demand; and producer distribution is atomistic, *i.e.* distributed among many small producers. Programs that enhance demand through promotion and consumer information are now preferred to historical tools of creating artificial scarcity and prices, as well as using tax dollars to support farm prices. The importance of promotional programs has increased enormously with the globalization of the agricultural economy, coupled with the nation's mid-1990's entry into trade treaties that eviscerate the utility of quantity controls by prohibiting import restrictions and that also prohibit subsidies.

ARGUMENT

A. WHETHER PROMOTIONAL REGULATIONS WARRANT REVIEW AS ECONOMIC REGULATION, AS OPPOSED TO HEIGHTENED FIRST AMENDMENT SCRUTINY, TURNS ON WHETHER THEY DIRECTLY SERVE AN ECONOMIC REGULATORY PURPOSE, NOT ON WHETHER THEY ARE EMBEDDED IN OTHER ECONOMIC REGULATION.

The court below misinterpreted this Court's opinion in *Glickman v. Wileman Bros.*,[1] which exempted collective advertising assessments from heightened First Amendment scrutiny. It misread the holding as limited to the context where the advertising is embedded in a program that broadly curtails a producer's freedom to market and contains price and quantity controls.

While it is true that the *Wileman Bros.* opinion "stress[ed] the importance of [the] context" in which the promotional regulations were found, namely, a program that displaced "many aspects of independent business activity,"[2] it did so to emphasize the economic character of the promotion. The Court held that the promotional regulations "should [not] be scrutinized under a different standard than that applicable to the other anticompetitive features of the marketing order."[3] The broad nature of the

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[1] 521 U.S. 457 (1997).

[2] *Id.* at 469.

[3] *Ibid.* Thus, "no greater weight should be given to the fact that some producers do not wish to foster generic advertising than to the fact that many of them may well object to the marketing orders themselves because they might earn more money in an unregulated market." *Id.* at 474.

holding is highlighted by the first words of the principal dissent: "The Court today finds no First Amendment right to be free of coerced subsidization of commercial speech. . . . "[4]

The appellate court misconstrued the "germaneness" prong of the test that *Wileman Bros.* applied, the traditional test taken from this Court's review of First Amendment challenges to agency shop and integrated bar regulation.[5] It reasoned that generic advertising is not "germane" within the meaning of *Wileman Bros.* unless it is germane "to a valid, comprehensive, regulatory scheme." The reasoning is faulty, because the benchmark for germaneness in the applicable test is not other regulatory *provisions*, but "the *purpose* for which the compelled association was justified."[6] *Wileman Bros.* concludes that "generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders,"[7] which is to "maintain such orderly marketing conditions for agricultural commodities" as "will establish . . . parity prices" for farmers.[8] Since the purposes of the Mushroom Promotion and Research Act

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[4] *Id.* at 478.

[5] The Court's discussion relied primarily on *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) [agency shop], *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) [integrated bar], and *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991) [agency shop].

[6] *Wileman Bros.*, 521 U.S. at 473, emphasis added, citing *Keller*, 496 U.S. at 13.

[7] *Ibid.*

[8] 7 U.S.C. § 602(1).

include "maintain[ing] and expand[ing] existing markets," generic advertising is "unquestionably germane to [those] purposes. . . . "[9]

The correct focus of germaneness analysis is further clarified by a functional alternative to the "germaneness" touchstone that was recommended by four justices in *Lehnert* as "more administrable,"[10] expressed there as it relates to agency shop review:

> Our First Amendment jurisprudence therefore recognizes a correlation between the rights and the duties of the union, on the one hand, and the nonunion members of the bargaining unit, on the other. Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost.[11]

The fact that the dissenter may not even want the service makes no difference. Some employees, for example, may think that they could negotiate a better employment contract for themselves than the union achieves for the rank and file and may therefore feel that the union contract works them a *disservice*. Yet for almost 50 years, since

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[9] *Wileman Bros.*, 521 U.S. at 473.

[10] *Lehnert*, 500 U.S. at 551.

[11] *Id.* at 556 (concurring and dissenting opinion by Justice Scalia).

Railway Employees' Department v. Hanson,[12] this Court has approved the "stand-alone" requirement to pay for speech services in the form of collective bargaining.

The circuit court's misreading of the germaneness/corresponding-obligation prong carried over into its treatment of the historical "free rider" rationale for compelling contribution.[13] Since the court viewed price and quantity controls – which it mistakenly believed to be in the marketing order *Wileman Bros.* reviewed[14] – as the sole grower benefits, it judged these to be the only program features raising the free rider issue.[15]

The correct analysis is that the advertising is a service that the law requires the Secretary to perform and for which payment can accordingly be compelled in order to distribute the cost fairly.

There is no basis in free speech/free association analysis to hold that "less is more," namely, that any potential

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[12] 351 U.S. 225 (1956); *Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Board of Education, supra*, 431 U.S. 209; *Ellis v. Railway Clerks*, 466 U.S. 435 (1983); *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991).

[13] *See Lehnert*, 500 U.S. at 519.

[14] The order, codified at 7 C.F.R. Part 917 (1989), includes authority for paid advertising and for production and marketing research, *id.* at § 917.39, daily shipping report requirements, *id.* at § 917.177, maturity standards, *id.* at § 917.460, size and packing standards, *id.* at § 917.454, and authority to levy assessments to pay for all of the programs, *id.* at § 917.37.

[15] *United Foods v. United States of America; United States Department of Agriculture*, 197 F.3d 221, 224 (6th Cir. 1999).

burden on free speech/free association interests is somehow weightier where not accompanied by non-speech-related regulatory burdens. Moreover, such a test invites the potential mischief of a legislature's adding possibly unnecessary non-speech regulation solely to constitutionally qualify the compelled payment.

B. STABILIZING FARM PRICES HAS BEEN THE CONSISTENT ECONOMIC PURPOSE OF GOVERNMENTAL INTERVENTION, BUT THE MEANS HAVE CHANGED FROM CREATING SCARCITY TO EXPANDING MARKETS.

Because the agricultural market is naturally subject to a number of destabilizing factors, governmental intervention to stabilize farm income through the ups and downs has employed different tools, which have evolved over time. Collective promotion has become the most favored and the one most adapted to today's globalized agricultural market.

1. The agricultural market is subject to destabilizing factors which government intervention has sought to address.

(a) Variable supply and inelastic demand.

Agriculture is subject to uncontrollable as well as unpredictable natural forces that greatly affect crop size.[16] At the same time, the demand for agricultural

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[16] Rusek, Christopher, *Trade Liberalization in Developed Countries: Movement Toward Market Control of Agricultural Trade*

commodities is generally inelastic, *i.e.*, prices are very responsive to changes in availability of the product, so that a one percent increase in quantity can result in more than a one percent decrease in price.[17] Thus, the industry must deal with cycles of overproduction and low prices followed by short supplies and high prices.[18]

(b) Seasonality and perishability.

Because farm products are mature and ready for market during a limited time span, and because much produce is highly perishable, producers are put in a weak bargaining position. As this Court has noted, "[a] large portion of an entire year's labor devoted to the production of a crop could be lost if the farmer were forced to

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in the United States, Japan, and the European Union, 48 Admin. L. Rev. 493, 497 (1996).

[17] *See, e.g.*, Scott, Robert, *Exported to Death: The Failure of Agricultural Deregulation*, 9 Minn. J. Global Trade 87, 102 at n.13 (2000); Purnell, David R., *A Critical Examination of the Target Export Assistance Program, Its Transformation into the Market Promotion Program and Its Future*, 18 N.C. J. Int'l L. & Comm. Reg. 551 at n.139 (1993) ["The natural instability of agricultural markets due to inelastic demand and fluctuating supplies dictated by the vagaries of nature on which agricultural production depends so completely, promotes significant swings in the price of agricultural commodities on world markets."]; Chen, Jim, *The American Ideology*, 48 Van. L. Rev. 809, 857 (1995) ["Increased supply suppresses the price of any given agricultural commodity. And falling prices do not increase total demand by price-inelastic food consumers."].

[18] Rusek, *supra*, 48 Admin. L. Rev, op. cit.

bring his harvest to market at an unfavorable time."[19] "Historically, perishability of produce forced the farmer to take whatever price he could obtain at the time of the harvest. . . . Even in a reasonably competitive market, physical inability to withhold produce will place a producer at a disadvantage."[20]

(c) Lagged production and limited mobility of resources.

Producers of perennial crops face problems of long planning horizons, long lags between initial planting and production,[21] essentially fixed assets, and large capital requirements. These factors are conducive to maintaining excess capacity, which, of course, results in a lowering of prices.[22] There is a tendency to overinvest when prices are favorable. Then, when prices drop, adjustments are both difficult and slow because of the specialized nature

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[19] *National Broiler Marketing Assn. v. United States*, 436 U.S. 816, 825 (1977).

[20] *Id.* at 840 (White, J., dissenting).

[21] For example, it takes 5 to 8 years to bring tree crops into production. California Agricultural Statistics Service, *California Fruit & Nut Acreage* (1992).

[22] *See* Lauck, Jon, *After Deregulation: Constructing Agricultural Policy in the Age of "Freedom to Farm,"* 5 Drake J. Agric. L. 3, 5 (2000) ["Instead of adjusting supply when prices sink to unsustainable levels, farmers often maintain production levels – believing that they need to operate at full-capacity in order to make up for lower prices – or increase their production."].

of production resources.[23] The problem of sustained low incomes due to limited mobility of resources out of commitment to a particular crop is referred to as "the farm problem."[24]

(d) Many Small Producers and Homogeneous Products.

"[A]griculture is made up of a large number of widely dispersed, atomistic producers with no one producer of sufficient size to significantly affect markets."[25] The U.S. Department of Agriculture estimates the country's farm sector is made up of 2,187,000 farms and ranches.[26] Because market power is diluted among so

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[23] *Ibid.* ["Unlike other industries, where firms and their productive capacity exit the market when prices decline, farms continue to produce commodities, further depressing prices"; fn deleted].

[24] Gardner, B.L., *Changing Economic Perspectives on the Farm Problem,* 30 Journal of Economic Literature 62-101 (1990).

[25] Looney, J.W., *The Changing Focus of Government Regulation of Agriculture in the United States,* 44 Mercer L. Rev. 763, 767 (1993). *See also* Davidson, Kenneth M., *Symposium: 1982 Merger Guidelines: The Competitive Significance of Segmented Markets,* 71 Calif. L. Rev. 445, 451, n.32 (1983) ["Agriculture is an atomistic homogeneous product market. It is periodically subject to both natural disasters and economic distress from overproduction."].

[26] U.S. Department of Agriculture, Economic Research Service, *Agricultural Income and Finance Situation and Outlook,* <http://usda.mannlib.cornell.edu/reports/errsor/economics/ais-bb/2000/agricultural income and finance 12.18.98> (October, 2000).

many individual producers, producers have always considered themselves to be price takers rather than price makers.[27] A factor further undercutting an individual producer's ability to create a market is that, unlike most manufactured products, the product of one agricultural producer is not readily distinguishable from that of another producer.

> In the vast sea of farms, all producing fungible commodities, no farmer can demand a price higher than the prevailing market rate. Nor can any one farmer, acting alone, affect price merely by manipulating output.[28]

"Due to this atomistic nature of agricultural production," government regulation of agriculture has been designed to protect the individual farm from market instability, with "boom-bust pricing cycles."[29]

2. Government programs to stabilize farm prices through quantity control and price subsidies have fallen out of favor.

Price regulation can be effectuated by manipulating either demand or supply. Whereas collective advertising programs address the demand side of the equation, early

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[27] Forker, Olan, & Ronald Ward, *Commodity Advertising*, Lexington Books (1993) at 7. ["Since the producers are small in size and large in number relative to the purchasers of their production they have considered themselves 'price takers' with little influence over the price or form of their products when marketed."] *See also* Rusek, *supra, ibid.*

[28] Chen, Jim, *supra*, 48 Van. L. Rev. at 853.

[29] Looney, *supra*, 44 Mercer L. Rev. at 767.

congressional efforts to stabilize farm prices focused on limiting supply, *i.e.*, they sought to raise prices by creating artificial scarcity. The Agricultural Adjustment Act of 1933 responded to the farm emergency created by the Great Depression by taxing farm commodities and using the proceeds to encourage decreases in production.[30] 1937 saw the arrival of the Agricultural Marketing Agreement Act, which authorized control of quantity in order to maintain prices.[31] The following year, Congress enacted the Agricultural Adjustment Act of 1938, which attempted "to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices."[32]

Supply restrictions have fallen into disfavor. Thus, in 1996, when Congress passed what has been called "freedom to farm" legislation[33] as part of an agenda to roll back the New Deal, the Chairman of the Senate Agriculture Committee opened the final discussion by recounting that the "supply and control" dictates of the New Deal had required his father to destroy part of his corn crop and some of his hogs.[34] This 1996 legislation not

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[30] Ch. 25, 48 Stat. 31 (1933) (current version at 7 U.S.C. §§ 601-626.) *See United States v. Butler*, 297 U.S. 1, 67 (1936). *See also* Looney, *supra*, at 765.

[31] Ch. 296, 50 Stat. 246 (1937).

[32] *Wickard v. Filburn*, 317 U.S. 111, 115 (1942); Pub.L. No. 75-430, ch. 30, 52 Stat. 31 (1938).

[33] Federal Agricultural Improvement and Reform Act of 1996, Pub.L. No. 104-127, 171, 110 Stat. 888, 937-38; codified in scattered sections of Title 7 of U.S.C.

[34] Lauck, Jon, *supra*, 5 Drake J. Agric.L. at 4.

only represents Congressional preference against government intrusion in markets, but is specifically linked to greater efforts to promote free trade and agricultural exports.[35]

In addition to manipulation of supply, another historical tool for stabilizing farm income has involved large scale government payments to farmers to support prices.[36] In 1992, for example, seventy-five percent or more of the nation's wheat, cotton, rice, and feed grain acreage was enrolled in a price support program.[37] These programs have been criticized on a number of bases,[38] including the complexity of the rules and the cost to the taxpayer.[39] Complexity not only frustrates participants,

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[35] Lauck, Jon, *Against the Grain: The North Dakota Wheat Pooling Plan and the Liberalization Trend in World Agricultural Markets*, 8 Minn. J. Global Trade 289, 322 (1999).

[36] For a discussion of the history of price supports, *see* Rasor, Paul B., & James B. Wadley, *The Secured Farm Creditors Interest In Federal Price Supports: Policies and Priorities*, 73 Ken. L.J. 597 (1985); and Rasmussen, Wayne D., *New Deal Agricultural Policies after Fifty Years*, 68 Minn. L. Rev. 353 (1983).

[37] Malasky, Alan R., Christopher R. Kelley & Susan A. Schneider, *Resolving Federal Farm Program Disputes: Recent Developments*, 19 Wm. Mitchell L. Rev. 283, 285 (1993).

[38] Forker & Ward, *supra*, *Commodity Advertising* at 89; Malasky, *et al.*, *supra*, at 298. A common criticism of the price and income support programs has been that most of the benefits are received by the large producers. Looney, *supra*, n.15, at 790-91.

[39] Kelley, Christopher R., *Rethinking the Equities of Federal Farm Programs*, 14 N. Ill. U. Law Rev. 659, 661-663 (1994).

but conduces to enforcement problems.[40] Taxpayer costs for price supports are heavy. In 1995, for example, payments under commodity programs alone cost about six billion dollars,[41] and half of all federal spending on direct subsidies and programs for all industries went to agriculture.[42]

The 1996 legislation,[43] substituted production flexibility contract payments for price supports, with the purpose to help producers who had become dependent on price supports to make the transition to a market-based economy.[44] The Act also terminated acreage

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[40] *See* Kelley, Christopher R., *Recent Federal Farm Program Developments* 4 Drake J. Agric. L. 93, 122 (1999) ["Even experts have trouble understanding the federal farm program at times. But when white collar criminals get into the act, deliberately making their manipulations as complicated and disguised as possible, it is an even greater challenge to make sense out of what has happened."] *See also Winters Ranch Partnership v. Viadero*, 123 F.3d 327 (5th Cir. 1997), arising out of an investigation into whether participants met eligibility and payment limitation requirements of federal price support programs.

[41] Agricultural Secretary Dan Glickman, Remarks at Agriculture Department Outlook Conference, Fed. News Service, Feb. 21, 1996, available in LEXIS, News Library, Fednew File.

[42] *See* Kelley, Christopher R., *supra*, 4 Drake J. Agric. L. 93, 96, n.18.

[43] Federal Agricultural Improvement and Reform Act of 1996, Pub.L. No. 104-127, 171, 110 Stat. 888, 937-38.

[44] At least until 2002. For a discussion of the program, *see Domestic Commodity Programs*, Chapter 57, 5 *West Federal Administrative Practice* 230 (1999).

reduction programs, and 15 million set aside acres have now been returned to production[45]

3. The commodity marketing programs are now viewed as preferable means for achieving farm income stability.

As both quantity controls and heavy taxpayer support for farmers have become less favored, generic promotion and advertising for agricultural commodities have come into prominence as a way of approaching the supply-demand problem from the other side, namely, by increasing demand, and with very small costs to government.[46]

> "Generic advertising is the cooperative effort among producers of a nearly homogeneous product to disseminate information about the underlying attributes of the product to existing and potential consumers for the purpose of strengthening demand for the commodity."[47]

Through these programs, producers have been able to put together enough money to "operate rather large information programs to inform consumers of the attributes of their commodity. . . . "[48] By the mid-1980s, there was general acceptance of funding these programs through

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[45] *See* McNiel, Dale E., *Furthering the Reforms of Agricultural Policies in the Millenium Round*, 9 Minn. J. Global Trade 41 (2000).

[46] *See, e.g.*, Rausser, Gordon C. and David Nielson, *Looking Ahead: Agricultural Policy in the 1990s*, 23 U.C. Davis L. Rev. 415, 422-427 (1990).

[47] Forker & Ward, *supra*, *Commodity Advertising* at 2.

[48] *Id.* at 10.

mandatory assessments.[49] "Commodity industries recognize the need to advertise their products but also recognize the need for everyone who benefits to pay their share of the program costs."[50] Collective promotion programs have reduced the cost of government price supports,[51] a consequence providing the express reason for establishing at least one such program.[52]

4. The growing importance of the world agricultural market and treaty restrictions on import limitations and price subsidies make promotion the foremost tool to support farm income.

Just as earlier in this century the agricultural economy went from local to interstate in scale,[53] it has now

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[49] Forker & Ward, *supra, Commodity Advertising* at 89.

[50] Forker & Ward, *supra, Commodity Advertising* at 19.

[51] *See* Kinnucan, H.W., & E.T. Belleza, *Price and Quantity Impacts of Canada's Dairy Advertising Programs*, Agricultural and Resource Economics Review, Vol. 24 (1995); *see also* Kinnucan, H.W., P.A.Duffy, & K.Z. Ackerman, *Effects of Price vs. Non-Price Export Promotion; the Case of Cotton*, 17 Review of Agricultural Economics 91-100 (1995).

[52] Senate Report No. 98-163 on Dairy and Tobacco Adjustment Act of 1983, Pub.L. 98-180.1675-1677.0.

[53] Portions of the first Agricultural Adjustment Act of 1933 were declared unconstitutional by this Court in *United States v. Butler*, 297 U.S. at 74, in part because they dealt with what was deemed a "local" matter, i.e., agriculture. When the broader Agricultural Adjustment Act of 1938 was reviewed by this court in *Wickard v. Filburn*, 317 U.S. 111, agriculture had expanded and was deemed an interstate enterprise. *See* Looney, *supra*, 44 Mercer L. Rev. at 765.

become internationalized.[54] Thus, the role of collective promotional efforts by producers becomes more important as markets become more distant and complex and as producers face possible hurdles – in the form of trade barriers – to their access to relevant markets.

The United States is the world's largest agricultural exporting nation.[55] Thirty percent of our agricultural production is exported,[56] and the agriculture sector has consistently been the largest positive contributor to the U.S. balance of trade.[57] The nation's farm productivity has been increasing at a rate of 3 to 4 percent annually, and the growth in foreign markets for those products far exceeds that in the domestic market,[58] in 1996 by a factor of four.[59]

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[54] The internationalization of agriculture is a constant theme in recent law review articles. *See, e.g.*, Centner, Terence J., *The Internationalization of Agriculture: Preparing for the Twenty-First Century*, 73 Neb. L. Rev. 5 (1994).

[55] Purnell, David R., *A Critical Examination of the Target Export Assistance Program, Its Transformation into the Market Promotion Program and Its Future*, 18 N.C. J. Int'l L. & Comm. Reg. 551 at n.71 (1993).

[56] McNiel, Dale E., *Furthering the Reforms of Agricultural Policies in the Millennium Round*, 9 Minn. J. Global Trade 41-42 (2000).

[57] *Ibid.*

[58] *Ibid.*

[59] Parker, James V., *The U.S. Approach to Export Market Development*, in Ferrero, Ackerman, and Nichols, eds., *Agricultural Commodity Promotion Policies and Programs in the Global Agri-Food System, Proceedings from the NEC-63 Conference* 1, 4 (1996).

International free trade agreements and organizations policing them now limit government intervention in agricultural markets. The United States had long urged agricultural reform under the GATT treaty,[60] calling for a phasing out of all government subsidies which either directly or indirectly affect trade.[61] Success came in 1994 with the Uruguay-Round-generated World Trade Organization Agreement on Agriculture, which prohibits or highly restricts subsidies.[62] While the Agreement limits most traditional subsidies to the agricultural sector, it does not limit the extent to which a country can support market development activities.[63] Thus, nations around the world are retooling their export strategies to emphasize GATT-permitted market development and promotion.[64]

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[60] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; as amended by Uruguay Round Agreements Act, Pub.L. No. 103-465 (1994)

[61] McNiel, *supra*, 9 Minn. J. Global Trade at 52.

[62] Agreement on Agriculture, Articles 4(2), 6, 7, Annex 1A, Agreement Establishing the World Trade Organization, April 15, 1994 (reprinted in H.R. Doc. No. 316, 103 Cong., 2d Sess. 1355 (1994)); *see* 43 U.S.C. § 624(f). *See* Gantz, David A., *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 Ariz. J. Int'l & Comp. Law 7 (1995); Figueroa, Miguel A., *The GATT and Agriculture*, 5 Kan. J. of Law and Pub. Pol. 93 (1995).

[63] General Accounting Office, Agricultural Marketing, Comparative Analysis of U.S. and Foreign Promotion and Research Programs, GAO/RCED-95-171 Agricultural Marketing, 1995, at 13.

[64] Parker, James V., *supra*, in *Agricultural Commodity Promotion Policies and Programs in the Global Agri-Food System* at 11. *See also* Ward, Ron, *Commodity Promotions: A Global View, op. cit.* at 15.

California, for example, has marketing programs for over 40 agricultural commodities. Advertising and education account for over 80% of the aggregate budget, and no program has price or quantity controls. Over 35 of these programs are, like the mushroom program under review, "stand alone" promotion/research programs, unaccompanied by non-speech-related restraints.[65]

Notably, any attempt to control prices by placing quantity restrictions on American producers would be defeated by treaty obligations not to restrict imports. Because both the 1994 Agricultural Agreement under GATT and North American Free Trade Agreement[66] limit import restrictions – the latter will essentially eliminate them by the year 2008[67] – any shortfall will simply be filled by imported agricultural products. Thus, this historic form of economic regulation that the circuit court analysis relied on will not be available.

CONCLUSION

Economic regulation to support farm prices can theoretically be approached by limiting quantity, or, obversely, by expanding the market. Expanding the market through promotion is no less economic regulation than

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[65] Marketing is generally constrained by other statutory provisions.

[66] North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289, 605 (1993) article 703(3), Annex 703.3; *see* NAFTA Implementation Act, 19 U.S.C. §§ 3301-3473 (1993).

[67] *Id.* at ch. 7(A).

regulating the quantity a grower can bring to market. Promotion has come to be more acceptable than quantity limitations, and more acceptable than direct taxpayer support through payments to compensate for price deficiencies. With the greatly increasing importance of the world agricultural market to the American agricultural sector, and with treaty provisions that severely restrain the import restrictions that would be necessary to make quantity limitations effective, and that also severely restrain subsidies, promotional programs are the tool of choice to achieve the regulatory purpose of protecting farm income.

As this Court ruled in *Wileman Bros.*, collective promotional programs for agriculture partake of the nature of economic regulation, and as such are not subject to heightened scrutiny under the First Amendment. Such programs are no less economic regulation because not accompanied by additional, non-speech-related regulation.

Accordingly, the decision below should be reversed.

Respectfully submitted,

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Supreme Court of the United States

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
Petitioners,

v.

UNITED FOODS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* JEANNE AND STEVE CHARTER, NORTHERN PLAINS RESOURCE COUNCIL, INC., THE WESTERN ORGANIZATION OF RESOURCE COUNCILS, DAKOTA RESOURCE COUNCIL, POWDER RIVER BASIN RESOURCE COUNCIL, THE IDAHO RURAL COUNCIL, AND THE CAMPAIGN FOR FAMILY FARMS IN SUPPORT OF RESPONDENT

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BRIEF OF *AMICI CURIAE*

Pursuant to Rule 37, Rules of the Supreme Court, *amici curiae* Jeanne and Steve Charter, Northern Plains Resource Council, Inc., the Western Organization of Resource Councils, Dakota Resource Council, Powder River Basin Resource Council, the Idaho Rural Council, and the Campaign for Family Farms submit the following brief for consideration by the Court in resolving the issues in this appeal.[1]

STATEMENT OF INTEREST

Jeanne and Steve Charter (Charters) are residents of the State of Montana and operate a ranch near Shepherd, Montana. Charters also market some of their cattle directly as high quality beef under the name, Charter Ranch Beef. Charters, as producers of cattle, are subject to the Beef Promotion Research Act and Order (Beef Act and Beef Order). 7 U.S.C. § 2901 *et seq.*; 7 C.F.R. §§ 1260.101-1260.217. The Beef Act and Beef Order is similar to that of the mushroom promotion program at issue in this case because producers of cattle are required under the Act and Order to pay a $1.00 per head assessment on all cattle sold or imported into the United States. The payment is collected and remitted directly to the Cattlemen's Beef Board or a qualified state beef council to pay for beef promotion and education programs. 7 U.S.C. § 2904(8)(A)-(C); 7 C.F.R. §§ 1260.172(a)(1), 1260.310, 1260.311(a), and 1260.312(c).

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party to these proceedings authored, in whole or in part, this amici curiae brief. No other entity or person, aside from the amici, made any monetary contribution for the preparation or submission of this brief to the Court.

Proceedings were instituted against the Charters by the USDA in 1998 for the non-payment of the $1.00 assessment on the sale of 250 head of cattle. The Secretary of Agriculture entered a final decision adverse to Charters. Thereafter, Charters filed a petition for judicial review in the United States District Court for the District of Montana challenging the constitutionality of the Beef Act and Beef Order. This petition is pending in District Court at the filing of this brief.

The Northern Plains Resource Council (NPRC) is a non-profit corporation existing under the laws of the State of Montana. NPRC is a 29 year old grass roots citizens group dedicated to protecting Montana's family agriculture and air, land and water. NPRC has many cattle producer members who are obligated to pay assessments pursuant to the Beef Act and Beef Order but who oppose this program. On behalf of its producer members, NPRC worked to end the mandatory assessment under the Beef Act and Beef Order by campaigning for a producer referendum to terminate the program.

The Western Organization of Resource Councils (WORC) is an association of six grassroots organizations in North Dakota, South Dakota, Idaho, Montana, Wyoming and Colorado. The members of these affiliated groups are farmers, ranchers, small businessmen, and working people seeking to protect natural resources, family farms, and rural communities. Some of these members are obligated to pay the assessment under the Beef Act and Beef Order. These groups are likewise opposed to compelled advertising programs.

The Dakota Resource Council (DRC) is a grassroots organization formed in 1978 to work on the protection of North Dakota's land, air, water, rural communities and agricultural economy. Members of the DRC are obligated to pay assessments pursuant to the Beef Act and Beef Order and otherwise oppose compelled advertising programs.

The Powder River Basin Resource Council (PRBRC) is a grassroots organization committed to the preservation and enrichment of Wyoming's agricultural heritage and rural lifestyle. The PRBRC, likewise, has members who are obligated to pay assessments under the Beef Act and Beef Order and are opposed to compelled advertising programs.

The Idaho Rural Council is a grassroots organization working to preserve Idaho's family farms and rural communities and build a more sustainable society. Its members include ranchers and farmers who raise cattle and are obligated to pay the mandatory beef checkoff under the Beef Act and Beef Order and are opposed to compelled advertising programs.

The Campaign for Family Farms (CFF) is an unincorporated association of family farm and community membership organizations, including the Land Stewardship Project (Minnesota), Iowa Citizens For Community Improvement, Missouri Rural Crisis Center and the Illinois Stewardship Alliance, which advocates for independent hog producers. CFF member organizations oppose mandatory checkoff assessments which all hog producers must pay pursuant to the Pork Promotion, Research and Consumer Information Order. 7 U.S.C. §§ 4801-4819; 7 C.F.R. § 1230. This program is similar to that of the mushroom promotion program at issue in this case because it is funded by mandatory producer assessments on all swine sold and pays for promotion, research and education programs related to pork. At the request of pork producer members, CFF conducted a petition drive and submitted to the USDA a petition signed by more than 19,000 pork producers calling for a referendum on termination of the mandatory pork checkoff program. USDA conducted a producer referendum through which a majority of producers voted to terminate the

program.[2] Former United States Agriculture Secretary Dan Glickman announced the program would be terminated based on this majority vote by producers.[3] Agriculture Secretary Ann Veneman has now reversed this decision and has decided not to terminate the Pork Checkoff Program despite the majority vote of producers for termination.[4]

This brief is filed pursuant to Rule 37.3(a), Supreme Court Rules. The requisite consent letters have been filed with the Clerk.

INTRODUCTION

The *amici* herein requested consent to file their brief because this Court's ruling on the Sixth Circuit decision in *United Foods* will impact their ability to challenge the constitutionality of the Beef and Pork Promotion and Research Acts and Orders.[5] The rationale of *United Foods* is compelling and should be affirmed. Such affirmation will call into question the constitutionality of similar marketing and promotion orders such as the Beef and Pork Promotion Orders. *Amici*, due to their involvement in the production side of various agricultural commodities, deal with the day-to-day direct and indirect effects and results of the promotion orders. *Amici* believe it would be helpful to the Court for an explanation of the constitutional infirmities they experience.

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[2] 65 Fed. Reg. 43,498 (July 13, 2000).

[3] United States Department of Agriculture, *Statement of Secretary of Agriculture Dan Glickman on the Pork Checkoff Referendum*, USDA News Release No. 0015.01 (Jan. 11, 2001).

[4] United States Department of Agriculture, *USDA Announces Pork Checkoff Program to Continue Under Settlement That Requires Program Restructuring*, USDA News Release No. 0037.01 (Feb. 28, 2001).

[5] *United Foods, Inc. v. United States of America*, 197 F.3d 221 (6th Cir. 1999).

SUMMARY OF THE ARGUMENT

The Mushroom Act at issue in this case is similar to the Beef and Pork Acts in structure and in mandatory assessments which are used to fund advertising, research and educational programs. The beef and pork industries are unregulated and producers must compete in an open market. There is no comprehensive regulation of the beef and pork markets. The beef and pork markets, like the mushroom market, have not been collectively exempted from antitrust laws or otherwise subsidized through price supports or restrictions on supply.

The Sixth Circuit decision in *United Foods* should be affirmed because it properly followed the principals in *Glickman v. Wileman Brothers & Elliot, Inc., et. al.*, 521 U.S. 457 (1997). *Wileman* stands for the proposition compelled advertising is appropriate in a collectivized industry where the nature of the advertising is non-ideological. The Sixth Circuit decision is consistent with precedent of this Court involving the funding of various compelled activities. This prior precedent has plainly set forth the rule that highly collectivized industrial sectors may force certain individuals to support or pay for particular activities so long as they are related to the purpose of the collectivization. In the case at bar, since the mushrooms, beef and pork industrial sectors are not collectivized, the rule set forth in this Court's prior precedent involving highly collectivized industrial sectors is inapplicable. Consequently, the first part of the test involving collectivization of the industry to support compelled advertising fails.

The second part of the test is whether the compelled speech is non-ideological and non-political. The experience of producers in the beef and pork checkoff programs is that such promotion is not non-ideological nor it is non-political. Repeatedly beef producers and pork producers are associated

with messages and political positions to which they vehemently oppose and object. This occurs because the private commercial entities operating the beef and pork checkoff programs receive the bulk of the mandatory assessments and thereby represent themselves as speaking on behalf of all beef and pork producers. Such representations are plainly not non-ideological and not non-political. Consequently, the programs violate the First Amendment rights to free speech and free association.

ARGUMENT

I. The Mushroom Act and the Beef and Pork Acts are Similar

The Beef Promotion and Research Act (Beef Act) became law in 1985. 7 USC §§ 2901-2910. The Beef Act required the Secretary of Agriculture to establish a Beef Promotion and Research Order which would provide for the financing of beef promotion and research in the United States. *Goetz v. Glickman,* 149 F.3d 1131, 1132 (10th Cir. 1998). Though somewhat of a misnomer because producer assessments are mandatory, this program is commonly known as the beef checkoff program. The promotion and research is funded through assessments on cattle sold and imported into the United States. *Id.* The Beef Order established by the Secretary of Agriculture created the Cattlemen's Beef Promotion and Research Board (CBB) and the Beef Promotion Operating Committee (BPOC). *Id.* The CBB is made up of cattle producers and importers appointed by the Secretary from nominations submitted by a strictly prescribed group of commodity associations. The CBB's principal duties are to administer the Beef Order, make rules and regulations to effectuate the terms of the Beef Order, and elect members to serve on the BPOC. The BPOC is composed of 10

members of the CBB and 10 members selected by certain state federations or beef councils. The BPOC develops and submits to the Secretary the promotion, advertising, research, consumer information industry plans and projects funded by the $1.00 assessment (checkoff). The Beef Act and Beef Order prohibit funds being used in any manner for the purpose of influencing governmental action or policy, with the exception of recommending amendments to the Order. 7 U.S.C. § 2904(10); 7 C.F.R. § 1260.169(e). However, as demonstrated below, these provisions have not stopped the organization receiving the beef producer assessments from compelling all beef producers to be associated with its ideological and political speech.

The operation of the Beef Act and Beef Order changed decidedly in approximately 1995. At that time, the USDA recognized the formation of the National Cattlemen's Beef Association (NCBA) as an entity authorized to submit names to the Secretary for individuals who may serve on the BPOC and as an eligible contract entity pursuant to other provisions of the Beef Act and Beef Order.[6] The NCBA became an umbrella entity responsible for receipt of 90 percent of the checkoff funds.[7] The NCBA utilizes joint staffing agreements and thereby provides the bulk of program operations needed by the CBB.[8] In 1998, NCBA administered through joint staffing agreements with the CBB, over 90 percent of

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[6] November 20, 1995, *letter of Monte Reece to Barry Carpenter,* Exhibit B4, *In re Jeanne and Steve Charter,* BPRA Docket No. 98-0002.

[7] Testimony of Monte Reece; transcript of proceedings at 86, August 4, 1999, *In re Jeanne and Steve Charter,* BPRA Docket No. 98-0002.

[8] Testimony of Monte Reece; transcript of proceedings at 89-90, August 5, 1999, *In re Jeanne and Steve Charter,* BPRA Docket No. 98-0002.

approximately $55,000,000.00 per year in checkoff funds.[9] A solid majority of other associations eligible to nominate members to the CBB are also NCBA related state affiliates.

The Pork Promotion, Research and Consumer Information Act (Pork Act) became law in 1985. 7 U.S.C. § 4801 *et seq.* The Pork Act required the Secretary of Agriculture to establish a pork promotion, research and consumer information order which would provide for pork promotion, research and education. 7 U.S.C. § 4803. Though somewhat of a misnomer because producer assessments are mandatory, this program is commonly known as the pork checkoff program. This program is administered by the National Pork Producers Delegate Body (Delegate Body) and the National Pork Board. 7 U.S.C. § 4806. The Secretary of Agriculture appoints Delegate Body members from pork producers who have been nominated by state organizations as set out in regulations governing the pork checkoff program. 7 C.F.R. § 1230.31. Importer members are selected by the Secretary after consultation with importers. 7 C.F.R. § 1230.31. The Delegate Body recommends the rate of the pork checkoff assessment, determines the percentage of net assessments attributable to state associations, and elects hog producers and importers for appointment by the Secretary to the 15 member National Pork Board. 7 C.F.R. § 1230.39. The National Pork Board develops budgets and awards contracts which are supposed to carry out the intent of the pork checkoff program. 7 U.S.C. § 4808(b). The Pork Act and Pork Order prohibit funds being used in any manner for the purpose of influencing legislation or governmental policy or action, with the exception of recommending amendments to the Order. 7 U.S.C. § 4809(e); 7 C.F.R. § 1230.74(a). However, as demonstrated below, those provisions have not

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[9] *Id.* at Testimony of Monte Reece at 89.

stopped the organizations receiving pork producer assessments from compelling all pork producers to be associated with its ideological and political speech.

The Pork Act acknowledged an existing non-profit organization, the National Pork Producers Council (NPPC), as an entity for facilitating implementation of the Pork Act. 7 U.S.C. § 4809. Thus, Congress authorized temporary disbursement of pork checkoff funds directly to NPPC in 1986. *Id.* Within a short time, NPPC became the National Pork Board's primary contractor for spending the proceeds of the assessments.[10] According to USDA's Office of Inspector General, the National Pork Board presently contracts with NPPC "to provide working space; routine personnel, administrative, and accounting services; and the technical and professional applications necessary to implement requirements of the Act."[11] Since 1996, the National Pork Board has awarded all program grants to NPPC.[12]

Mushrooms, like beef and pork, are subject to an order from the Secretary of Agriculture establishing a council made up of producers nominated for appointment by the Secretary. 7 U.S.C. § 6104(b); 7 C.F.R. § 1209. Similarly, the mushroom order directed the council to carry out programs, plans and projects to provide maximum benefit to the mushroom industry. The council's activities were funded through mandatory assessments on various producers. 7 U.S.C. § 6104(g); 7 C.F.R. § 1209.51. As in beef and pork, these funds were to be used for generic advertising efforts and not for any political purposes. 7 U.S.C. § 6104(h).

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[10] Office of Inspector General, United States Department of Agriculture, Evaluating Report No. 01801-I-KC, *Agricultural Marketing Service Controls Over Pork Checkoff Funds* (Mar. 1999) at 1-2.

[11] *Id.*

[12] *Id.*

II. The Decision of the Sixth Circuit in *United Foods* Should Be Affirmed

The Court of Appeals' decision at issue here interprets *Wileman* to require a two step analysis for determining when compelled, commercial speech, such as agricultural commodity promotion programs funded by mandatory producer assessments, violate the First Amendment. This decision should be affirmed because it properly applies *Wileman* and is consistent with other Supreme Court precedent regarding compelled speech and association.

The Sixth Circuit, in *United Foods,* concluded:

> [T]he explanation for the *Wileman* decision is to be found in the fact that the California tree fruit industry is fully collectivized and is no longer a part of a free market, as well as in the nonpolitical nature of the compelled speech. The majority uses the concept of collectivization and the nonideological nature of the advertising together. The conjunction "and" germaneness "and" nonpolitical—is used in the Court's holding. Our interpretation of *Wileman* is that if either of the two elements is missing—either the collectivization of the industry or the purely commercial nature of the advertising—the First Amendment invalidates the compelled commercial speech. . . . The Court's holding in *Wileman,* we believe, is that nonideological, compelled, commercial speech is justified in the context of the extensive regulation of an industry but not otherwise. The purpose of this principle joining regulation and content is to deter free riders who take advantage of their monopoly power resulting from regulation of price and supply without paying for whatever

commercial benefits such free riders receive at the hands of the government.

197 F.3d at 224. *Wileman* clearly supports the Sixth Circuit's holding that both elements—collectivization of the industry and non-ideological speech—must be met for compelled, commercial speech in the context of mandatory agricultural commodity promotion programs to withstand a First Amendment challenge. The mushroom program fails the test because it did not meet the collectivization of the industry element. The Beef and Pork Promotion and Research programs would fail for the same reason. In addition, these programs also fail to meet the non-ideological speech element of the analysis.

III. *Wileman* and Related Precedent Establish That Compelled Advertising Assessments Are Constitutional Only in the Context of Comprehensive Market Regulation.

Collectivization of the particular industry was a central component of the analysis in *Wileman.* The Court specifically acknowledged the Agricultural Marketing Act of 1937 was enacted to establish and maintain an orderly market condition and fair prices for agricultural commodities. *Wileman,* 521 U.S. at 461. This marketing order displaced competition in various discreet markets. *Id.* The Court noted, "Collective action, rather than the aggregate consequences of independent competitive choices, characterizes these regulated markets." *Id.* The collectivization manifested in mechanisms for uniform price, limits on the quality and quantity which could be marketed, size and grade determinations, and orderly disposition of surpluses. *Id.* In the third portion of the *Wileman* opinion, the Court wrote:

> In answering that question we stress the importance of the statutory context in which it arises. California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme. It is in this context that we consider whether we should review the assessments used to fund collective advertising, together with other collective activities. . . .

Id. at 469. The generic advertising program made sense in *Wileman* because all of the respondents were engaged in the business of marketing certain California fruits and it was presumed they agreed with the central message or speech in the generic program. *Id.* at 470. It was a basic policy decision in volatile markets for agricultural commodities that the public would be best served by compelling cooperation among producers in making economic decisions rather than would otherwise be made in a free market.

The Sixth Circuit in *United Foods* would have erred had it not followed this market collectivization analysis in *Wileman.* The notations just set forth demonstrate the focused analysis applied by the Court and the utmost importance the collectivization of the California fruit market played in the analysis. Similarly, the Sixth Circuit focused on the economic collectivization analysis when it looked at the mushroom market and found it was unregulated. The logical extension from *Wileman* is forced or compelled advertising in an

unregulated market—like beef, pork or mushrooms—had to be unconstitutional. *United Foods,* 197 F.3d at 222.

United Foods is consistent with other precedent involving compelled speech or association. This older precedent arose out of disputes in highly collectivized economic situations. The precedent utilized in *Wileman* demonstrated that compelled speech or association, even in the commercial context, would only be tolerated if it were germane to the underlying collective action. Collectivization limited solely to promotion and research purposes in otherwise unregulated markets should not permit application of the rule in *Wileman.*

Abood involved a Michigan law which permitted union representation for local government employees. *Abood v. Detroit Board of Education,* 431 U.S. 209, 211 (1977). A union and local government employer were permitted to establish agency shop arrangements. This meant every employee was represented by a union, even though not a member of the union, and was required to pay the union a sum equal to the union dues. *Id.* at 211. The dispute involved a teacher's union and whether dues of teachers opposing certain union activities unrelated to collective bargaining could be used to pay for those activities. *Id.* at 212-13. The analysis in *Abood* focused on collective bargaining which was justified by the legislative conclusion about the important contribution of the union shop to the system of labor relations in the United States. *Id.* at 222-23. *Abood* set forth the rule the Constitution requires expenditures for something other than collective bargaining be financed from receipts by individuals who do not object to financing those ideas and who are not coerced into doing so. *Id.* at 235-36.

Next, in *Chicago Teachers Union,* the Court addressed whether a collective bargaining contract provision could permit a board of education to deduct from non-union teachers an amount equivalent to union dues. *Chicago*

Teachers Union Local No. 1 v. Hudson, 475 U.S. 292, 294-95 (1986). The issue here was whether procedures by the Chicago Teachers' Union and approved by the board of education adequately protected the non-union protestors to this contract provision. *Id.* at 302. The Court held a union's collection of agency fees to solve a free ridership problem required an adequate explanation of the basis for a fee, a prompt opportunity to challenge the amount of the fee, and an escrow for the amounts reasonably in dispute while the challenges were pending. *Id.* at 310.

Keller, likewise, involved a highly collectivized economic entity. *Keller v. State Bar of California,* 496 U.S. 1, 4 (1990). Specifically, the California State Bar was integrated. *Id.* at 4-5. Integrated meant it was an association of attorneys where membership and dues were required as a condition for practicing law. *Id.* at 5. Lawyers sued the state bar claiming certain bar activities utilized their mandatory dues payments for political and ideological causes to which they objected. *Id.* at 4. The lawyers asserted the compelled financial support of such activities violated their First and Fourteenth Amendment rights to free speech and free association. *Id.* A substantial analogy was noted between the integrated bar of the State of California and employee unions and their members. *Id.* at 12. The Court applied *Abood* and held:

> The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

Id. at 14. The guiding principal to be utilized was whether the challenged expenditures were necessarily or reasonably

incurred for the purpose of regulating the legal profession or improving the quality of the legal services available to the people of the state. *Id.*

The lesson of *Abood, Chicago Teachers, Keller* and *Wileman* is the underlying extensive collective activity dictates when compelled speech is justified. For compelled speech to pass constitutional muster, it must be related to and support the underlying collective action. This is the central theme from precedent. As the Sixth Circuit found below, the type of collective activity contemplated in *Wileman,* however, does not exist in the mushroom industry nor does it exist in the beef or pork industries. Beef and pork production and marketing are not done through collective action. Each beef and pork producer competes with other producers to sell animals in a free market. There is no regulatory scheme which sets uniform prices, subsidizes prices, or controls supplies. There is no protection from market fluctuations and there is no orderly disposition of surplus to avoid depressed prices. One only needs to note the USDA's own study in regard to market fluctuations and depressed beef markets.[13] Unlike the fruit producers in *Wileman,* beef and pork producers do not market their animals through collective action which is exempt from antitrust laws. In the beef and pork sectors there is no collective bargaining as in *Abood* and *Chicago Teachers.* There is no required membership to sell

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[13] Mathews, Hahn, Nelson, Duewer & Gustafson, *The U.S. Beef Industry Cattle Cycles Price Spread and Packer Concentration,* Economic Research Service/USDA, Technical Bulletin 1874 (April, 1999) (cattle cycle operates in an environment involving natural and biological factors, cattle numbers, grain exports, government programs, and other factors in addition to biological lags). Similar circumstances are evident in the hog markets. Jeffrey S. Becker, Congressional Research Service Issue Brief, *Hog Prices: Questions and Answers* (Dec. 15, 1999) <<http://www.cnie.org./nle/ag-68.html>> (last visited Mar. 5, 2001).

swine and cows as there was for lawyers to practice law in *Keller*.

When the government enters a market by authorizing collective action, which is not only exempt from antitrust laws but also displaces many aspects of independent business activity which characterizes other portions of the economy in which competition is fully protected, to provide certain benefits to producers, it is appropriate to require those producers promote the program under which they enjoy these benefits. Philosophically, however, the same rule should not apply in situations where there is no such collectivization. Producers should not be forced to pay as in *Abood, Chicago Teachers* or *Keller* unless their activity is collectivized to the same degree. There is no such collectivization for mushroom, beef or swine producers.

IV. *Wileman* and Related Precedent Establish That Compelled Advertising Assessments Are Unconstitutional if They Involve Political or Ideological Speech.

In Section IV of the *Wileman* decision, this Court thoroughly discusses precedent regarding compelled speech and association. *Wileman*, 521 U.S. at 469-474. This discussion clearly buttresses the Sixth Circuit's application of the second element of the test it applied to determine whether the Mushroom Promotion Order violated the First Amendment. This second element is whether the compelled speech is non-ideological and non-political. It is imperative this second element be maintained in analyzing whether agricultural commodity promotion and research orders funded by mandatory producer assessments violate the First Amendment. There are many ways which such programs may be used to compel producers to finance and be associated with ideological or political speech, thus creating the very crisis of

conscience for many producers that the First Amendment is designed to protect against.

The following discussion demonstrates how the current beef and pork promotion and research orders administer compelled ideological and political speech. One example of compelled ideological speech is the use of mandatory beef producer assessments to pay for promotion of branded products. Since the formation of the NCBA and the USDA's recognition of it as the principal beef checkoff contractor and program operating entity, the emphasis has shifted from generic advertising into branded product promotion for the largest food processors in the United States. The NCBA has devoted substantial sums of checkoff money in recent years to develop and promote to consumers highly processed, centrally manufactured beef products. For example, the beef checkoff has partnered closely with the giant processor, Hormel Foods, to promote "Hormel Beef Tips With Gravy" among other trademarked Hormel Foods offerings. Beef is only 1 of 22 listed ingredients in the particular product. Such branded product promotion is ideological speech because it does not promote beef in general, but rather, a specific manufactured beef product.

Amici object for ideological reasons to the use of checkoff funds for promoting highly processed meats because its path, in their view, will end in further industry vertical integration and centralization to their own disadvantage and detriment. Such promotion turns consumers away from purchasing high quality, unadulterated, perishable, wholesome meats, such as Charters' and *amici* organizations' members' produce, and towards consumption of lower quality denatured products. The current branded product marketing emphasis of the beef checkoff serves to devalue Charters' and the *amici* organizations' producer members' beef into one of many cheap ingredients combined in a centrally manufactured industrialized system of fast food production. Displacement

of pure beef with highly processed product will end the *amici's* way of doing business, which is not only necessary to their individual livelihoods but also the traditional decentralized economic and social foundation for many regions of the rural United States.

Charters and the *amici* organizations' producer members are opposed to the beef checkoff's branded product promotion, yet these producers are continually compelled to finance promotions which they oppose from an ideological perspective. They are also associated with this compelled speech when checkoff funded branded product and generic advertising indicates the products are supported by America's beef producers. Consequently, not only are Charters and the other *amici* organizations' producer members required to fund a marketing strategy and centrally manufactured products which work to the disadvantage of their own high quality beef products, they are associated with that very same product against their will.

Another example of how beef producers are compelled to finance and be associated with political or ideological speech is through the NCBA's claim to represent all of the nation's beef producers when it makes public statements on policy issues not purely associated with beef promotion. For instance, in 1995, NCBA issued a report indicating its new post-merger structure would mean the industry would speak with *one voice on beef issues* and that it would be able to focus all available resources on a single long-range plan with a single set of objectives.[14] (Emphasis added.) Next, NCBA began advocating "the National Cattlemen's Beef Association is the marketing organization and trade association for America's *one million cattle farmers and ranchers.* With

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[14] Memo, November 16, 1995, National Cattlemen's Beef Association Report to the industry.

offices in Denver, Chicago and Washington, D.C., NCBA is a consumer focused, producer directed organization representing the largest segment of the nation's food and fiber industry."[15] (Emphasis added.) The only way NCBA can claim to speak on behalf of "America's one million cattle farmers and ranchers" is because these producers must pay the mandatory checkoff assessments which NCBA gets to spend. NCBA cannot claim one million cattle producer dues paying members. Yet, NCBA repeats this claim of representing all cattle farmers and ranchers and acts to speak, as one voice, for the entire beef industry over and over in support of its positions on numerous public policy issues which are unrelated to beef promotion. This claim was repeated on August 7, 1997, when the NCBA supported biotechnology and genetic engineering research.[16] It was again repeated when NCBA advocated approval of fast track trade agreements[17] and applauded the use of irradiation in the beef industry.[18] Because all of the nation's beef producers are required to pay checkoff assessments, the vast majority of which funds are contracted to NCBA, it claims representation

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[15] National Cattlemen's Beef Association, Press Release (June 25, 1997).

[16] National Cattlemen's Beef Association, Statement (Aug. 7, 1997) ("initiated in 1898, the National Cattlemen's Beef Association is the marketing organization and trade association for America's one million cattle farmers and ranchers. . . .").

[17] National Cattlemen's Beef Association, Press Release (Oct. 22, 1997) ("initiated in 1898, the National Cattlemen's Beef Association is the marketing organization and trade association for America's one million cattle farmers and ranchers. . . .").

[18] National Cattlemen's Beef Association, Press Release (Dec. 2, 1997) ("initiated in 1898, the National Cattlemen's Beef Association is the marketing organization and trade association for America's one million cattle farms and ranchers. . . .").

of all of the nation's producers when it exercises political speech by lobbying Congress on specific policy positions.[19]

NCBA has taken specific policy positions in lobbying Congress on legislation which would mandate packer's publicly report prices paid for live cattle, and on other legislative issues, while representing to Congress it is acting on behalf of over one million beef producers from across the country.[20] Many of the policy positions NCBA advocates in the name of all beef producers are vehemently opposed by Charters and the other *amici* organizations' beef producer members. Because the mandatory checkoff assessments are the basis for NCBA's claims that it speaks on behalf of all the nation's cattle producers when advocating specific public policy positions, these programs are being used to compel political and ideological speech by *amici* producers in violation of the First Amendment principles set out by this Court.

The mandatory producer assessments which fund the Pork Promotion, Research and Consumer Information Order (pork checkoff program) are also being used to compel *amici* organizations' pork producer members to finance, and to be associated with, political and ideological speech to which they are opposed. Pork checkoff funds are used to produce a website. The home page of the site states it is "a service of the National Pork Producers Council in cooperation with the National Pork Board."[21] At the bottom of many of the separate information pages on this website, including those

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[19] George Swan, president-elect, NCBA, Testimony to Senate Committee on Agriculture, Nutrition and Forestry (June 10, 1998).

[20] Congressional Record, Senate, July 15, 1998 (letter from NCBA, July 14, 1998).

[21] National Pork Producers Council, *Home Page* <<http://www.nppc.org>> (last visited Mar. 5, 2001).

which address and advocate for specific public policy positions unrelated to pork promotion, it states: "A service of the National Pork Board as implemented by the National Pork Producers Council (NPPC)."[22] Both through the direct use of the pork checkoff funds to partially pay for this website, and by reference to the National Pork Board which is funded exclusively by the mandatory pork checkoff and whose sole responsibility is administration of the pork checkoff program, pork producers, through their assessments, are being compelled to finance and be associated with political and ideological speech.

One example of political and ideological speech included on a page of NPPC's website, which includes the statement "A service of the National Pork Board as implemented by the National Pork Producers Council (NPPC)," is Congressional testimony of NPPC Director John Caspar regarding the impact of agribusiness concentration on producers and consumers.[23] *Amici* organizations' pork producer members are ideologically opposed to many of the policy related statements made in this Congressional testimony. However, they have been compelled to finance the public dissemination of this political and ideological speech through their checkoff assessments. In addition, in this specific testimony, Mr. Caspar reported to the Congressional committee that he was speaking on behalf of the nation's pork producers: "Today, I am representing America's pork producers."[24] Like the NCBA's similar claims to speak on behalf of all beef producers, NPPC is using the fact that all of the nation's pork

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[22] *Id.*

[23] National Pork Producers Council, *Pork Industry Testimony Jon Caspers* <<http://www.nppc.org/NEWS/testimony000510.html>> (last visited Mar. 5, 2001).

[24] *Id.*

producers must pay checkoff assessments as a basis for claiming to speak on their behalf. These mandatory producer assessments are thus compelling *amici* organizations' pork producer members to finance and to be associated with political and ideological speech to which they are steadfastly opposed in violation of First Amendment principles discussed by this Court in the *Wileman* decision.

In *Wileman*, the Court took particular note of circumstances which would violate the First Amendment right to free speech or association. One of these was where the promotional program might compel producers to endorse or finance any political or ideological views. 521 U.S. at 470. A First Amendment violation was also noted in *Wileman* by requiring someone to use their own property to convey an antagonistic ideological message, or forcing them to respond to a hostile message when they would prefer to remain silent, or require them to be publicly identified or associated with another's message. *Id.* at 471. In the beef and pork checkoff programs, *amici* and their members are compelled to endorse or finance political or ideological views which they oppose. They are required to use their own property consisting of the compelled assessments to convey an antagonistic ideological message or, more importantly, are publicly identified or associated with the message of the NCBA or the NPPC. In *Abood* and *Keller*, the teachers union and the State Bar of California were prohibited from the expenditure of funds on political messages unrelated to the reason for their economic existence. Likewise was the conclusion in *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *see also Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980). In *Pruneyard*, the Court expressed the view that being compelled to affirm a belief in a prescribed position or view could violate the First Amendment.

The Court has also been concerned about the constitutionality of requiring a utility to place in its billing

statements certain political announcements or positions regarding legislation which could adversely affect its business. The Court notes the central thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas, with a corollary freedom not to speak publicly. *Pacific Gas & Electric Co.v. Public Utility Comm'n of California,* 475 U.S. 1, 9 (1986). In *Pacific Gas,* a First Amendment violation occurred by requiring a utility to include a particular message on its billing statements. The fear was the appearance of such a message would leave the appearance the utility agreed with the message. *Pacific Gas,* 475 U.S. at 15-16. So should it be here where the members of the *amici* are publicly associated with particular positions before Congress and elsewhere. The Court has noted for *corporations* and *individuals* alike the choice to speak includes with it the choice of what not to say. *Roberts v. United States Jaycees,* 468 U.S. 609, 622 (1984). The actions of the NCBA and NPPC force *amici* to support positions they oppose, and with their money. These actions improperly impinge upon what should be considered a harbinger of individual liberty and the type of highly personal relationships which are subject to preservation without impingement by the government or, particularly, the NCBA or NPPC. *Roberts,* 468 U.S. at 618-619. Requiring the members of the *amici* to be associated with specific messages of these industry related organizations strikes at the heart of the crisis of conscience the Court has previously mentioned.

CONCLUSION

The Court should affirm the Sixth Circuit decision in *United Foods.* The Sixth Circuit properly interpreted *Wileman* to include a two prong test to determine whether agricultural commodity promotion and research programs funded by mandatory producer assessment violate producer's First

Amendment protections. *Wileman* clearly supports the Sixth Circuit's holding both elements—collectivization of the industry with the effect of restraint on competition and non-ideological speech—must be met for compelled, commercial speech in the context of mandatory agricultural commodity promotion programs to withstand a First Amendment challenge. Some commodity promotion programs may fail to pass constitutional muster under one or both of these elements. In the mushroom, beef and pork sectors alike, there is no regulated collectivization which impacts open competition. Thus, these programs should fail to pass constitutional muster under the first element of the test. Additionally, in the beef and pork sector, aspects of the promotion programs fail the second element of the test because they compel producers to finance and/or to be associated with political or ideological speech to which they are opposed.

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UNITED STATES
and DEPARTMENT OF AGRICULTURE,

Petitioners,

v.

UNITED FOODS, INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

UNITED STATES
and DEPARTMENT OF AGRICULTURE,

Petitioners,

v.

UNITED FOODS, INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

INTEREST OF AMICUS CURIAE[1]

The Center for Individual Freedom (the Center) is a non-profit organization with the mission to investigate, explore, and communicate in all areas of individual freedom and individual rights, including, but not limited to, free speech rights, property rights, privacy rights, the right to bear arms, freedom of association, and religious freedoms. Of particular importance to the Center are constitutional protections for the freedom of speech, including each citizen's freedom from viewpoint-based compulsion to support the speech of others.

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. There is a fundamental First Amendment equivalence between the compulsion of speech and the restriction of speech. Because both use coercion to manipulate public debate and public opinion, both are subject to comparable First Amendment scrutiny.

2. Compelled support for third-party speech must be subjected to First Amendment scrutiny comparable to the scrutiny applied to restrictions on voluntary support for similar speech. The "germaneness" analysis developed in connection with compelled support for the mixed speech and conduct of labor unions is best understood as the corollary of the analysis regarding restrictions on speech that is mixed with conduct. In mixed speech and conduct cases, a burden on speech may be permissible if it is incidental to the valid regulation of conduct closely bound up with the burdened speech. Likewise, compelled support for speech must, at a minimum, arise from validly compelled support for conduct that is closely bound up with speech and such speech must not go beyond that necessary for the primary conduct.

The compelled advertising in this case fails that test because it is not incidental to and necessary for the accomplishment of some compelled primary conduct such as collective bargaining or collective sales. Any new rule allowing stand-alone compulsion of speech would dramatically erode core First Amendment principles distinguishing the regulation of speech from the regulation of conduct. If the First Amendment stands for anything, it stands for the propositions that *speech is different* and that the regulation of speech is more burdensome to liberty than regulation of conduct.

3. The so-called government speech doctrine cannot save the speech compulsion in this case. This Court should decline the government's invitation to rule on a new defense neither raised nor litigated in the courts below. The scope and permissibility of government advocacy directed at its own citi-

zens – in short, domestic propaganda – is a complex issue that has never been addressed in this Court except by *dicta* or non-controlling opinions. This is not an appropriate case through which to enter into that briar patch, foreclosing many future avenues of analysis by the lower courts in subsequent cases. Furthermore, contrary to some past *dicta*, domestic propaganda, whether political or economic, raises a significant First Amendment issue. Precisely because speech is different than conduct, using the coerced resources of government to manipulate public opinion and desire poses a much greater threat than does regulating public behavior alone. The test for government advocacy aimed at its own citizens thus should be the same as the test for compelled support for third-party speech.

ARGUMENT

The Sixth Circuit held that compelled support for generic advertising of mushrooms violated the First Amendment because it "is not 'germane' to any collective program" regarding mushrooms, regardless whether such advertising is viewed as non-ideological or nonpolitical in nature. Pet. 7a. That holding was correct. And both that result and the appropriate First Amendment test should remain the same even if this Court were to view this case as involving the government's own speech.

I. THE EQUIVALENCE OF COMPULSION AND RESTRICTION REGARDING THE FREEDOM OF SPEECH AND EXPRESSIVE ASSOCIATION.

It is a central First Amendment principle that the "freedom of speech" includes the complementary freedoms from both the restriction and compulsion of expression. As this Court recognized in *Riley* v. *National Feder'ation of the Blind*, while "[t]here is certainly some difference between compelled speech and compelled silence, * * * in the context of protected speech, *the difference is without constitutional*

significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." 487 U.S. 781, 796-97 (1988) (emphasis added). In *Abood* v. *Detroit Board of Education*, this Court likewise recognized such First Amendment equivalence as to monetary contributions in support of expression, holding that the "fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights." 431 U.S. 209, 234 (1977).

The fundamental objection to government regulation of speech – whether by prohibition or by compulsion – is that it coercively manipulates public opinion:

> Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government * * * pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information *or manipulate the public debate through coercion rather than persuasion.*

Turner Broadcasting Sys., Inc. v. *FCC*, 512 U.S. 622, 641 (1994) (emphasis added). Such government manipulation is constitutionally objectionable because at "the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." *Id.* at 641. While the government certainly has the authority to take numerous *actions* based upon prevailing points of view, such authority does not extend to manipulating public opinion. Rather, "[a]uthority here is to be controlled by public opinion, not public opinion by authority." *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 641 (1943).

The concern that public opinion – the "public mind" – remain free from manipulation by the government retains

force regardless of whether such manipulation is attempted by restriction or compulsion of speech:

> The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it. * * * "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.

Riley, 487 U.S. at 790-91. Tilting the playing field of ideas, whether through compelled subtraction or compelled addition of particular viewpoints, necessarily clashes with the First Amendment. There is little constitutional difference between the government placing its thumb on the scale via a viewpoint-discriminatory, though moderate, burden on disfavored speech or via a viewpoint-discriminatory benefit amplifying the voice of the favored side of a debate. In both instances the debate continues, but it does so on the government's terms and under the government's direction.[2]

Amicus suggests that compulsion and restriction should be analyzed in *pari materia*: Whatever First Amendment scru-

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[2] Even absent complete suppression of particular views, the First Amendment is offended by efforts to skew public debate. See, e.g., *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785-786 (1978) (where speech restriction "suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended") (footnote omitted); *Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

tiny is appropriate to a given restriction of speech should apply to the compulsion of like speech.

II. CONGRESS MAY NOT COMPEL SUPPORT FOR SPEECH THAT IS NOT INTEGRAL TO OTHERWISE PERMISSIBLE COMPELLED CONDUCT.

The government incorrectly claims that persons may be compelled to support even the ideological expressive activities of an organization "provided that the activities are 'germane' to a sufficiently important legislative purpose justifying the compelled association" with the organization. Pet. Br. 16. The government then defines the relevant "purposes" as merely the hoped-for end results or benefits motivating the Mushroom Act: maintaining and expanding demand for mushrooms and generally benefiting producers, processors, and the agricultural economy as a whole. *Id.* at 25. But the "germaneness" test requires far more than mere circular relation between a speech compulsion and the motivation for its imposition. Instead, a speech compulsion must be "germane" not to itself, but rather to the accomplishment of *some other action* that Congress has properly required. In this case, the stand-alone speech compulsion serves only itself, does not serve to implement other conduct that Congress has required, and thus violates the First Amendment.[3]

A. Compelled Speech Is "Germane" Only When It Is Required to Engage in Conduct Otherwise Properly Compelled.

The "germaneness" test was developed in the context of compelled contributions to labor unions and integrated bar associations. See *Abood*, 431 U.S. at 236 (contributions may

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[3] *Amicus* also disagrees with the government's claim that compelled speech is allowed where it is either "germane" *or* non-ideological. Pet. Br. 16-17 n.9. *Amicus* will leave that issue to others, however, and focus primarily on the substance of the "germaneness" requirement.

be compelled for "collective-bargaining activities," but "such compulsion is prohibited" for "ideological activities unrelated to collective bargaining"); *Keller* v. *State Bar of Cal.*, 496 U.S. 1, 16 (1990) ("Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession."). In *Lehnert* v. *Ferris Faculty Association*, the applicable standards for the use of compelled contributions in the union context were summarized as follows:

> chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

500 U.S. 507, 519 (1991). That description identifies the germaneness inquiry as relating to specific conduct and as separate from the government's "policy interest" or motive in adopting the legislative scheme in the first instance.

In its recent opinion in *Board of Regents of the University of Wisconsin System* v. *Southworth*, however, this Court recognized that even in the more familiar context of labor unions, it has "encountered difficulties in deciding what is germane and what is not." 529 U.S. 217, 232 (2000); see also *Keller*, 496 U.S. at 15 ("Precisely where the line falls * * * will not always be easy to discern. But the extreme ends of the spectrum are clear"). *Amicus* suggests that it would be appropriate to clarify that test and confirm that the germaneness of compelled support for speech must be measured against some underlying compelled conduct that cannot be accomplished without a certain amount of speech incidental to that conduct. That clarification of the germaneness test is consistent with the *Abood* line and with First Amendment ju-

risprudence relating to restrictions on mixed speech and conduct.

Over the long line of labor cases, this Court has identified specific economic conduct – negotiation and implementation of collective bargaining agreements – as both the permissible purpose of compelled support and the relevant *object* of the germaneness analysis. Thus, in *Railway Employees' Department* v. *Hanson*, this Court held that compelled "financial support of the collective-bargaining agency" does not violate the First Amendment but noted that "a different problem would be presented if the assessments were "imposed for purposes not germane to collective bargaining." 351 U.S. 225, 236, 238 (1956). In *Abood*, this Court followed *Hanson* "insofar as the service charge is used to finance expenditures by the union for the purposes of collective bargaining, contract administration, and grievance adjustment." 431 U.S. at 225-26. But this Court agreed with appellants there that a union could not, over objection, spend compelled service fees on speech "unrelated to its duties as exclusive bargaining representative." *Id.* at 234. And where the relation between particular speech and the "process of establishing a written collective-bargaining agreement" was uncertain, the Court suggested that the relevant inquiry would be whether the context of the speech "*might be seen as an integral part of the bargaining process*." *Id.* at 236 (emphasis added); cf. *Ellis* v. *Railway Clerks*, 446 U.S. 435, 448 (1984) ("the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues").[4]

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[4] While the collective bargaining process nominally involves speech, it is actually more a series of speech-acts – such as offers and acceptances – constituting the commercial transaction of contracting with the employer. Similarly with communications from the union to the employer and to the employees, those constitute the necessary elements of representation

By contrast, speech regarded as non-germane was not integral to the primary conduct being compelled. While such speech may have been relevant to the overall *goal* of the program – and hence germane in the colloquial sense – it was not essential to the required conduct itself and thus was analyzed distinctly from such conduct. For example, in *Lehnert* this Court held that generic promotional advertising by the union was not "germane" to collective bargaining because it was not a necessary element of such bargaining.

> [P]ublic speech in support of the teaching profession generally is not sufficiently related to the union's collective-bargaining functions to justify compelling dissenting employees to support it. Expression of this kind extends beyond the negotiation and grievance-resolution contexts and imposes a substantially greater burden upon First Amendment rights than do the latter activities.

500 U.S. at 528-29 (Blackmun, J., for four Justices). That such promotion might have advanced the general interests of the teaching profession collectively was insufficient to render such promotional activities "germane." Rather, any permissibly chargeable speech had to be far more closely tied to the actual conduct – collective contract negotiation and administration – being compelled in the first place.

This construction of the germaneness test is consistent with, and in effect the compulsion flip-side of, this Court's cases involving restrictions on mixed speech and conduct. For example, in *United States* v. *O'Brien* the law forbade harmful conduct – the destruction of an official document – that at times was intertwined with expression. 391 U.S. 367, 376 (1968). The law in *O'Brien* was upheld where the impact on speech was "incidental" to the underlying regulation of conduct, was "no greater than is essential" to accomplishing

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without which the union could not bargain, resolve grievances, or exchange information with those to whom it owes a duty of representation.

the interests of regulating the conduct, and met additional conditions designed to safeguard First Amendment values. *Id* at 377. In like manner, the germaneness test allows some burden on speech arising from compelled support of conduct where the speech burden is incidental and no greater than essential to achieve the otherwise properly compelled conduct. And finally, as in *O'Brien*, the purposes and effect of government-compelled contributions must be imposed for the "noncommunicative impact of [the supported] conduct, *and for nothing else*." *Id*. at 382; see also *id*. at 381-82 ("both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct").

As clarified and read in light of cases such as *O'Brien*, the germaneness test is an appropriate means of addressing the problem of compelled support for mixed speech and conduct. It is also a test that the government fails in this case.

B. Compelled Mushroom Advertising Is Not Integrally Tied to Compelled Conduct.

The government's primary dodge on the germaneness test is to misidentify the *object* of the test: that to which the speech compulsion must be "germane." Instead of the speech having to be germane to particular compelled conduct, the government claims the compulsion need only be germane to a government "purpose," defined at the highest possible level of generality as its "goal" or the "benefits" it hopes to achieve. See Pet. Br. 18 (Mushroom ads "germane to the statutory purposes" of expanding and developing markets for mushrooms). But that test is meaningless, and would fully eviscerate the germaneness requirement. Indeed, the compelled support for teacher promotional advertising rejected in *Lehnert* would satisfy the empty test proposed by the government, but eight members of the Court rejected such involuntary use of mandatory fees. The better test is that the speech must be tied to and in the service of some conduct that

is the primary object of compelled support or collective activity. In this case there is no joint conduct such as collective bargaining to which the mushroom ads are integrally related and hence "germane."[5]

The government counters that the mere existence of substantive regulation of a commodity has no bearing on the permissibility of compelled advertising because the "government's purpose for adopting a generic advertising program – to stimulate sales of a commodity – is equally valid regardless of" any other regulation of a commodity. Pet. Br. 12. But even if the same government "purpose" were thought to persist regardless of other regulation, it is only the *relationship* between such other regulation and the speech being compelled that serves to insulate incidental speech compulsions from the rigorous scrutiny applied to pure regulation of speech. That the government may have a "valid" purpose tells us nothing when that purpose is described at a sufficiently high level of generality, and it is beside the point in any event. Virtually any censor could describe their purpose with sufficient abstraction to render it "legitimate" in the sense that it would support government action in the non-speech arena under the rational basis test. But the First Amendment demands more. It is not the purpose, but the

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[5] It would be a different – though not necessarily constitutional – situation if the marketing order also compelled the collective sale of all mushrooms through the Mushroom Council. Under such circumstances, advertising by the Council, and compelled support of such advertising, might be considered integrally related to the sale of mushrooms *by the Mushroom Council itself*, and would be germane in the *Abood* sense to the compelled *conduct* of collective sales of mushrooms. It would also be a different case if the marketing order gave credit for the separate advertising of the growers, thus allowing for choice in content and viewpoint while still providing a mechanism for cooperation among those with similar perspectives. Such a viewpoint neutral approach avoids free-riders by effectively requiring that everybody do their fair share to build the mushroom market, and would relate directly to the grower's *own* sales of the mushrooms, unlike generic ads by an entity not itself selling the commodity.

"means" of accomplishing that purpose that is most often the subject of dispute in a First Amendment case, and this case is no different. Cf. *Riley*, 487 U.S. at 791 (even "purest of motives" do not allow government to "substitute its judgment as to how best to speak for that of speakers").[6]

The claim that "'the advertising tool merely seeks to accomplish the same goals as equally or more invasive tools, such as price, quantity, quality and labeling restrictions," Pet. Br. 22-23 (citation omitted), displays a gross misunderstanding of the relative offensiveness of different types of government conduct. The First Amendment establishes that speech regulation is, by definition, more invasive in a constitutional sense than are other forms of regulation entitled to presumptions of validity under rational basis review. As this Court noted in *Barnette*:

> The right of a State to regulate, for example, a public utility may well include * * * all of the restrictions which a legislature may have a "rational basis" for adopting. *But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.*

319 U.S. at 639 (emphasis added). That mere rationality is sufficient to regulate conduct but not speech simply highlights the point that *speech is different.*

The position taken by the government is reminiscent of the now-repudiated argument in *Posadas de Puerto Rico Associates* v. *Tourism Company of Puerto Rico* that the power to ban conduct, even when unexercised, includes the supposedly "lesser" power to regulate speech concerning such conduct. 478 U.S. 328, 345-46 (1986). This Court has emphatically rejected that contention, holding that it is "well settled

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[6] Indeed, the First Amendment forbids government action that is presumed to be valid under the government's enumerated powers, for if it were beyond the government's powers to begin with, there would be no need to reach the First Amendment question at all.

that the First Amendment mandates closer scrutiny of government restrictions on speech than of its regulation of commerce alone." *Greater New Orleans Broadcasting Ass'n, Inc.* v. *United States*, 527 U.S. 173, 193 (1999); *see also 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 510 (1996) (principal opinion) (rejecting contention "premised entirely on the 'greater-includes-the-lesser' reasoning endorsed toward the end of the majority's opinion in *Posadas*."). "The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society." *Id.* at 512.

The government makes the related argument that Congress might well prefer to achieve its goals through speech regulation in order to avoid the adverse consequences of "antagoniz[ing]" our trading partners or domestic consumers by direct efforts to support domestic producers and to prop up commodity prices. Pet. Br. 26 n.14. While the speech regulation in this case might well achieve the desired results and yet slip under the radar screens of those adversely affected, that is precisely why the regulation of speech is more offensive to the Constitution than is the regulation of conduct.

By manipulating public opinion, speech regulation is a much more insidious, intrusive, and effective means of controlling behavior than is the direct application of government fiat to individual conduct. *See 44 Liquormart,* 517 U.S. at 509-10 (principal opinion) (discussing *Posadas*: Puerto Rico's "advertising ban served to shield the State's antigambling policy from the public scrutiny that more direct, nonspeech regulation would draw").[7] While Congress may

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[7] Where people are free to think and speak, government regulation of conduct will be recognized for what it is, and accepted or opposed according to the strength of the arguments for and against the regulation. But where government tries to achieve the same regulatory result by altering the in-

well desire to avoid the political consequences of its programs and to hide their true costs, the First Amendment stands as a sound and sensible barrier to such political deception.

The notion that the benefits of the speech alone are sufficient to trigger the free-rider justification of the *Abood* line of cases, Pet. Br. 12, 30, independent of any group benefits from other substantive regulation, is mistaken and repugnant to the First Amendment. If the supposed benefits of the forced speech alone are sufficient to justify compelled collective speech, then there is nothing that would fail to satisfy that test. In any instance where the government elects to force speech at all, it plainly believes there is some benefit to that speech, and under the rational basis test proposed by the government, courts would rarely be in a position to say otherwise. But while "private speech often furthers the interests of nonspeakers," the existence of such positive externalities "does not alone empower the state to compel the speech to be paid for." *Lehnert*, 501 U.S. at 556 (Scalia, J., concurring in the judgment and dissenting in part).

C. *Wileman* Is Not Inconsistent with Rigorous Application of the Germaneness Test.

This Court's decision in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), sensibly understood, is quite compatible with the above analysis of the germaneness test. Although some language from the late-June *Wileman* opinion might be misread to signal a sharp departure from core principles of decades-old jurisprudence, the better view of the opinion is to consider its overall context and to resist imputing to the majority such an unlikely purpose.

Taking the latter approach, there are two recurring points in the *Wileman* opinion that seem significant. First, the Court

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formation flow and hence altering the way people think about an issue to begin with, there is less chance that the government's coercion will be seen for what it is.

"stress[ed] the importance of the statutory context" in addressing the First Amendment question and determined, accurately or not, that California nectarines and peaches "*are* marketed pursuant to detailed marketing orders that *have displaced* many aspects of independent business activity." 521 U.S. at 469 (emphasis added). Second, the Court conducted its analysis on the view that respondents in that case "agree with the central message of the speech that is generated by the generic program." *Id.* at 470; see also *id.* at 471 ("none of the generic advertising conveys any message with which respondents disagree"). While the government might now dispute the accuracy of these core elements of the *Wileman* opinion, they were nonetheless accepted by the Court and provide essential context through which to help reconcile the opinion with longstanding cases and principles.

For example, when discussing *Abood* and the germaneness test, *Wileman* noted that "compelled contributions to support activities related to collective bargaining" could survive First Amendment scrutiny. 521 U.S. at 472. And when discussing *Lenhert*, the Court noted that dissenting union members could *not* be assessed "the cost of certain publications that were not *germane to collective bargaining activities*." *Id.* at 473. Both passages recognize that the object of the germaneness analysis is some collective *activity*, not merely some abstract policy goal. And the Court's discussion of the marketing orders in *Wileman* is consistent with that view. It thus described the compelled funding of generic advertising "as part of a broader collective enterprise in which [business entities'] freedom to act independently is already constrained," and noted that the compelled assessments were "used to fund collective advertising, together with other collective activities." *Id.* at 469. In this context, the Court's statement that the generic advertising was "germane to the purposes of the marketing orders," *id.* at 473, can best be understood to mean that it was germane to the "broader collective enterprise" thought to be established by such marketing

orders.[8] Such a view is quite consistent with the germaneness test as described by *Amicus* here.

The *Wileman* opinion also seems to have viewed the absence of disagreement with the message to have been significant to its analysis. Thus, in distinguishing *Abood*, the Court stated that "[n]one of the advertising in this record promotes any particular message" other than encouraging purchase of California tree fruit. 521 U.S. at 472. It viewed the objections by respondents as primarily based upon the amount of funds and the belief that their "money is not being well spent," rather than as based upon any "disagreement with the content of the message." *Id.* On a factual record thought to show no disagreement with the compelled speech, but merely an economic concern over the expenditures in general, there is no significant tension between the result in *Wileman* and a proper construction of the *Abood* line of cases. While some might argue with the Court's view of the factual record regarding respondents' objections, that is no reason to read the opinion as if such context were irrelevant and thereby convert a fairly modest holding into a sweeping doctrinal departure.

Because there is no "collective enterprise" to which the compelled advertising in the present case is "germane," and because respondent here undoubtedly disagrees with the content, not merely the cost, of the advertising, *Wileman* does not support the speech-only marketing orders in this case.

III. GOVERNMENT ADVOCACY SHOULD RECEIVE THE SAME LEVEL OF FIRST AMENDMENT SCRUTINY AS OTHER FORMS OF COMPELLED SPEECH.

The government argues – for the first time in this case – that the generic mushroom advertisements constitute govern-

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[8] That the government now claims that the marketing orders in *Wileman* were not in fact so broad and created no collective enterprise is irrelevant to a sensible understanding of that opinion and its assumption of such breadth and collectivization.

ment speech and that the "First Amendment does not constrain the government's ability to engage in speech of its own." Pet. Br. 13. In support of this novel proposition, it relies upon *dicta* from a number of this Court's cases that it reads to imply a government right to advocate domestically in favor of its preferred programs and policies. Pet. Br. 33. Although the government's failure to assert or brief that defense below makes this case a poor choice for addressing the complex problem of government speech, if this Court nonetheless reaches the issue it should hold that both the government and the prior *dicta* are incorrect. Instead, the First Amendment test for domestic government advocacy should be the same as the test for compelled support for third-party speech.

A. The Parameters of Government Speech.

Before considering any supposed government-speech doctrine, it is necessary properly to identify what constitutes government speech, and what variety of such speech is alleged to be present in this case. Government speech comes in many forms and arises in many contexts. It may involve primarily factual speech concerning the government's own activities, such as laws enacted or the annual budget, it may involve factual speech about other persons, things, or events, such as economic data, scientific research, or weather reports, or it may involve the expression of opinions and advocacy on topics ranging from government programs, public conduct, or, as in this case, agricultural commodities.

In addition to the various types of government speech, there are various modes by which the government speaks. It may speak through its officers and agents, through administrative officials, through official publications, or through the purchase of third-party communications services. The means by which the government purports to speak may have significant ramifications for First Amendment analysis and may

sometimes mix government speech with private speech, adding further complications.[9]

Finally, the government may be acting in different capacities in any given case, with material consequences for First Amendment analysis. For example, the government may act as employer, it may act as market participant in the sale of goods and services, it may act as sovereign speaking to its own citizens, it may act as sovereign speaking to the international community, or it may act in some mixture of these roles. Just as with restrictions or prohibitions on speech, the governmental role will alter the First Amendment analysis of government speech. See *Connick* v. *Myers*, 461 U.S. 138 (1983) (speech restrictions by government as employer). And just as public employees may be compelled to support speech necessary to effectuate collective bargaining agreements with government entities, such government entities, in their role as employers, are obviously entitled to negotiate such agreements as well, and to engage in such speech as is necessary to form and implement such agreements. But recognizing the necessity and acceptability of speech in one context does not, *a fortiori*, establish the propriety of government speech in all contexts any more than permissible speech restrictions in the workplace justify like restrictions on the public at large.

The point of this extended taxonomy is simply to show that government speech is a complex and heterogeneous issue that should not be determined on the basis of broad generalities about government speech made in past *dicta* and that should not be approached lightly in a case where the issue has not even been litigated before the lower courts. And even if

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[9] Speech by individuals within government, for example the President, Senators, or Representatives, may not be "government" speech at all, but rather individual speech. When an elected official communicates with constituents or campaigns for re-election, such speech is not on behalf of the government itself, but rather on behalf of the individual office-holder. The communication that occurs by the component members of government regarding their jobs is not the type of speech at issue in this case.

the Court were to grapple with the issue now, it should focus carefully upon the particular type of government speech allegedly at issue, without attempting to rule for other forms of government speech and without giving undue deference to the speech here out of concern for speech in some other circumstance that may well raise different concerns. The government's reliance on undifferentiated statements of support for government speech thus is overly simplistic and has a tendency to wash over material distinctions within the menagerie of government speech.

In this case, even assuming *arguendo* that the mushroom advertising involves government speech at all, the Court would be addressing government advocacy through the use of a targeted tax to coerce resources from a limited segment of the public to fund a message not expressly attributed to the government and targeted at the general citizenry in order to change their views in a manner favored by the government. This case thus does *not* involve speech or advocacy by individual officials within the government or by the government as market participant, but rather a diversion of supposedly public resources obtained through the coercive power of government in its role as regulator and sovereign.[10] Furthermore, the issue in this case at best involves government advocacy and persuasion, and not the very different issue of government publication of information.[11] As presented in this case,

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[10] As a simple example, if Congress were to appropriate a million dollars to buy a television advertisement saying "Please support the expansion of NAFTA" or "Please support air strikes against Iraq," that would be government advocacy. By contrast, if individual Senators or Congressmen were to hold a press conference and announce their support for NAFTA or Iraqi air strikes, that would not be government speech notwithstanding that the speakers are government officials.

[11] In many instances the government is required to provide information to the public, for example, the publication of any new laws it has passed. Similarly, publication of economic data raises different questions from attempts to persuade the public to a particular viewpoint. While the line between information and advocacy may sometimes blur, this case presents

therefore, the question is simply whether the government *qua* government may use its power to divert resources into viewpoint-specific advocacy that seeks to alter public opinion in a direction preferred by the government.

B. Creeping *Dicta* and the Need for Caution in Creating a Government Speech Doctrine.

The government relies on several cases for its claim that where the government is the speaker "the First Amendment is not implicated." Pet. Br. 13. In each of those cases, however, the issue of government speech was irrelevant to the holding and hence any incidental commentary regarding government speech was entirely *dicta*. In *Board of Regents of the University of Wisconsin System* v. *Southworth*, for example, the University expressly disavowed any government-speech defense, leading this Court to state that the "University having disclaimed that the speech is its own, we do not reach the question whether traditional political controls to ensure responsible government action would be sufficient to overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself." 529 U.S. 217, 229 (2000). Any commentary on the government's purported right to advocate its policies was admittedly unnecessary to the decision and thus classic *dicta*.

In *Rosenberger* v. *Rector & Visitors of the University of Virginia*, this Court squarely rejected the notion that the University itself was speaking or subsidizing its own preferred message and instead held that the University was "expend[ing] funds to encourage a diversity of views from private speakers." 515 U.S. 819, 834 (1995). Once again, commentary concerning what rules might apply to government speech was unnecessary to the decision and advisory.[12]

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a clear issue of government advocacy – literally "promotion" – intended to change public views of and desire for mushrooms.

[12] The government's citation to a concurring opinion in *Lathrop* v. *Donohue*, 367 U.S. 820, 857 (1961) (Harlan, J., concurring in the judgment), is

Finally, this Court's recent decision in *Legal Services Corporation* v. *Velazquez*, No. 99-603 (Feb. 28, 2001), repeats much of the *dicta* from *Southworth* and *Rosenberger*, but notes that the legal services program at issue "was designed to facilitate private speech, not to promote a governmental message," slip op. at 7, thus making such discussion *dicta* as well.

The essential point here is that this Court has never *held* that government speech is immune from First Amendment scrutiny, much less defined the remarkably complex parameters of government speech or the standards by which it should be evaluated. While there is admittedly a good deal of *dicta* opining on the topic, *Amicus* respectfully suggests that such opinions formed without benefit of a genuine adversarial clash ought to be viewed with skepticism, particularly where there is ample room to dispute the reasoning of the *dicta* in question, as will be discussed in the following section.

C. The False Equation of Government Speech with Government Conduct.

The government places primary reliance upon a passage from *Southworth* purportedly stating that the government is entitled to engage in " 'speech and other expression to advocate and defend its own policies.' " Pet. Br. 33 (quoting 529 U.S. at 229). The government's redacted passage from *Southworth* is, of course, *dicta* and the unredacted version is decidedly less conclusive regarding any supposed government speech rights:

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self-evidently non-authoritative, as are its citations to the concurring commentary in *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 598 (1999) (Scalia, J., concurring in the judgment), and *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment), and to the Court of Appeals decision by then-Judge Scalia in *Block* v. *Meese*, 793 F.2d 1303, 1313 (CADC) (Scalia, J.), *cert. denied*, 478 U.S. 1021 (1986). Pet. Br. 33-34, 40, 43-44.

> It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies. See, e.g., *Rust* v. *Sullivan*, 500 U.S. 173 (1991); *Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540, 548-549 (1983).

529 U.S. at 229.[13] But noting that it "seems" inevitable for the government to speak in support of its substantive programs does not mean that every instance of government speech is inevitable or acceptable even then. Furthermore, even *Southworth*'s more restrained suggestion of a potential government-speech doctrine turns on a mistaken parallel between government conduct and government advocacy. The error in that *dicta* is the same one discussed in the context of compelled support for third-party speech and it is wrong for the same reasons. While the government may certainly adopt controversial policies opposed by a current minority, it is highly doubtful whether the government may properly tilt the marketplace of ideas to ensure continued public support for its programs or to counter a current minority's efforts to change public opinion. Government's role is to obey the

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[13] This passage does not claim that government speech is immune from First Amendment scrutiny, as the government now claims, but rather notes that it is an unresolved "question" whether political checks alone are "sufficient to overcome First Amendment objections" to viewpoint-discriminatory university speech. If anything, the passage seems to recognize that the First Amendment at a minimum *applies* to such government speech and leaves open how the First Amendment might be satisfied.

changing popular will, not to play rearguard to give permanence to a temporal majority viewpoint.[14]

In the end, there is a substantial constitutional equivalence between many types of government speech and government coercion of support for third-party speech. Both raise concerns of government manipulation of the marketplace of ideas, viewpoint discrimination, and compelled support for objectionable advocacy. As Justice Scalia has observed regarding viewpoint discrimination in government *support* for third-party speech, to instead have speech "directly involving the government itself in viewpoint discrimination (if it is unconstitutional) would make the situation even worse." *Finley*, 524 U.S. at 598 (concurring in the judgment). While Justice Scalia would allow viewpoint discrimination in *both* circumstances, this Court has imposed significant First Amendment limits on such discrimination in the subsidies and compelled support contexts and should do likewise in the government speech context.[15]

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[14] The notion that it is "the very business of government to favor and disfavor points of view," *Finley*, 524 U.S. at 598 (Scalia, J., concurring in the judgment), is correct insofar as favored views are implemented through regulation of conduct rather than speech. But it is surely *not* the business of government to attempt to shape the public's views (or worse yet, entrench a currently fashionable view) rather than respond to such views while leaving them to evolve without governmental manipulation.

[15] Justice Powell's unsupported observation in his separate opinion in *Abood* that "[c]ompelled support of a private association is fundamentally different from compelled support of government," 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment), seems plainly incorrect in the context of non-expressive activities. While there perhaps ought to be some difference, *Amicus* is unaware of cases imposing a greater burden on government accomplishing a particular action directly or through the use of and payment to third parties. While third parties receiving funding for controversial conduct may be "representative of only one segment of the population," *id.*, the decision to fund the non-speech activities of such parties is still made by the government just as much as if the government used its own agents to conduct the same activities. Furthermore, even if support for compelled *activity* by private organizations were more suspect

One of the most telling arguments in favor of First Amendment limits on government speech comes indirectly from Justice Scalia himself, who allows that "it would be unconstitutional for the government to give money to an organization devoted to the promotion of candidates nominated by the Republican Party" and that "it would be just as unconstitutional for the government itself to promote candidates nominated by the Republican Party," though he does denies that such "unconstitutionality has anything to do with the First Amendment." *Finley*, 524 U.S. at 598 n.3 (concurring in the judgment). But no other source of unconstitutionality is readily apparent. And other Justices of this Court who have recognized constitutional difficulties with such openly partisan government speech have expressly identified the First Amendment as the source of those difficulties. See *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 788 (1961) (Black, J., dissenting) (quoting the First Amendment and then stating: "Probably no one would suggest that Congress could, without violating this Amendment, pass a law taxing workers, or any persons for that matter (even lawyers), to create a fund to be used in helping certain political parties or groups favored by the Government to elect their candidates or promote their controversial causes. Compelling a man by law to pay his money to elect candidates or advocate laws or doctrines he is against differs only in degree, if at all, from compelling him by law to speak for a candidate, a party, or a cause he is against. The very reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands."); *Lathrop*, 367 U.S. at 853 (Harlan, J., concurring in the judgment) (agreeing that neither a state nor the federal government could " 'create a fund to be used in helping certain po-

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than compelled support for direct government activity, the First Amendment inverts such suspicions in the context of expressive activity and association and government involvement in expressive choices makes matters worse, not better.

litical parties or groups favored' by it 'to elect their candidates or promote their controversial causes' " (quoting *Street* dissent)).[16]

One staple of the purported government-speech doctrine is the citation to *Rust* v. *Sullivan*. See. e.g., *Southworth*, 529 U.S. at 229; *Finley*, 524 U.S. at 597 (Scalia, J., concurring in the judgment). In *Rust*, however, the issue of government speech was not necessary to the decision. Indeed, this Court has recently recognized that *Rust* did not rely upon a claim that the government-financed medical activities at issue constituted government speech. *Velazquez*, slip op. at 6; see also *id*. (Scalia, J., dissenting), slip op. at 6 (noting that the speaker in *Rust* was not the government). *Rust*'s observation about the government's ability to choose "to fund one activity to the exclusion of" another, 500 U.S. at 193, seems to view the activity in question as conduct, and does not address the different issues raised by the viewpoint-discriminatory funding of speech. As noted previously, however, speech is different.

Another common argument in favor of a government speech doctrine is to cite the National Endowment for Democracy as evidence of the government's authority to engage in viewpoint discriminatory speech. This Court in *Rust,* for example, assumed that "[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." 500 U.S. at 194; see also *Finley*,

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[16] That the example involves political speech rather than commercial speech carries no dispositive weight given that the First Amendment protects both, albeit to a greater or lesser degree. *Amicus*'s point is merely that compelled support for speech – whether such speech is made by the government or by third parties selected by the government – should be subject to the same scrutiny as restrictions on like speech. The degree of scrutiny may vary with the type of speech at issue, but the initial applicability of the First Amendment remains constant throughout.

524 U.S. 597 (Scalia, J., concurring in the judgment) (citing *Rust*); cf. *Lathrop*, 367 U.S. at 857 (Harlan, J., concurring in the judgment) (speculating on propriety of using tax funds for United States Information Agency propaganda that might offend some taxpayers).

But pro-democracy propaganda directed at other countries is readily distinguishable from propaganda aimed at a domestic audience. Outward-directed propaganda serves far more legitimate national interests and raises far fewer concerns than does inward-directed propaganda. Furthermore, speech promoting basic constitutional structures even in the United States might conceivably overcome the relevant First Amendment scrutiny depending upon the nature of the speech and the supposed benefits to be achieved from such speech. Were such domestic advocacy to take on a partisan slant, however, there would be grave doubt regarding its constitutionality, regardless of whether the United States may use advocacy to promote a partisan agenda abroad.

In a similar vein, course selection at public universities may pose a unique situation requiring somewhat different analysis than government advocacy to the public at large. Both *Southworth* and *Rosenberger* appear to have been moved to comment on government speech in order to dispel any implication that public universities might somehow be constrained in selecting their offerings or that academics might somehow be forced to offer viewpoint-neutral courses. That concern is legitimate, but does not support a government speech doctrine untethered to the unique concerns of the university environment, and may not be sufficient in any event to overcome First Amendment objections. But a public university's potential claims to being a market participant in the educational context, its traditions of academic freedom and independence, and the ready choice among a variety of schools within the public system offer no support for the type of government advocacy at issue in this case, which shares none of those potentially distinguishing features.

Finally, this case does not raise the same practical issues as when government acts in a proprietary manner as a consumer of, for example, art to put up in its own buildings, where it might sensibly be given greater leeway than if it were purchasing art to inculcate a particular viewpoint among the public. Likewise, when the government is selling some product – surplus typewriters or confiscated vehicles perhaps – the First Amendment would pose little obstacle to its advertising just as any other seller would. Such speech would be incidental to the accomplishment of permissible government conduct and is fairly necessary to such conduct.[17]

Regardless of whether there are sufficient political checks on other forms of conduct by the government, First Amendment protection of the freedom of speech is not subservient to such political processes:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Barnette, 319 U.S. at 638. If political checks are inadequate to replace the First Amendment where the government chooses to compel a dissenting minority to support third-party speech, there is no reason why such checks suffice when the government avoids the middleman and coerces minority support for the same speech out of the government's mouth. In

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[17] Indeed, if the government actually did collectivize the industry and itself purchased all mushrooms for resale then promotional advertising incidental to the government's sale of such goods would likely be acceptable if the underlying collectivization were valid.

both instances the First Amendment should provide the same protection and the same heightened scrutiny.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Sixth Circuit should be affirmed.

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UNITED STATES OF AMERICA and
UNITED STATES DEPARTMENT OF AGRICULTURE,

Petitioners,

v.

UNITED FOODS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE INSTITUTE FOR JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit, public interest law firm committed to defending the essential foundations of a free society and securing greater protection for individual liberty. Toward that end, the Institute seeks to reinvigorate the founding principles of the First Amendment by protecting the free flow of political and commercial information indispensable to our republican form of government and to our free enterprise economy. The instant case involves not only the degree of scrutiny afforded commercial speech restrictions, but also the government's ability to compel individuals and corporations to fund the commercial speech of others. As such, it implicates the Institute's interest in the full protection of commercial speech, which includes both the right of Americans to speak freely as well as the corresponding right of Americans to remain silent.

STATEMENT OF THE CASE

Respondent United Foods, an American mushroom producer, conducts a comprehensive promotional campaign with the aim of convincing consumers to purchase

[1] In conformity with Supreme Court Rule 37, the Institute for Justice has obtained the consent of the parties to the filing of this brief, and letters of consent have been filed with the Clerk. The Institute also states that counsel for a party did not author this brief in whole or in part and that no persons or entities other than *amicus*, its members, and its counsel made a monetary contribution to the preparation and submission of the brief.

its "Pictsweet" brand mushrooms. The company's advertising efforts are targeted only to those local markets where United Foods mushrooms are available,[2] and its marketing strategy is to differentiate United Foods mushrooms from those offered by other mushroom producers.

Federal law, however, also compels United Foods to pay a monthly assessment to the Mushroom Council, which is used to fund a generic nationwide advertising campaign promoting mushroom consumption. The assessment in question is authorized by the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. §§ 6101-6112, and was implemented by an Order issued by the Secretary of Agriculture in 1993. 7 C.F.R. § 1209.51. Pursuant to the Secretary's Order, the Mushroom Council, which is comprised of mushroom producers nominated by fellow producers and selected by the Secretary, 7 U.S.C. § 6104(b), levies an assessment of up to one penny a pound on any persons or corporations producing or importing more than 500,000 pounds of mushrooms annually for the "fresh" market. See 7 C.F.R. §§ 1251-52. The Council then uses these funds for advertising that is designed, among other purposes, "to strengthen the mushroom industry's position in the marketplace." 7 C.F.R. § 1209.39(l). Such advertising is generic, meaning it may not contain any "reference to a

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[2] Because of the financial costs of shipping mushrooms as well as the fact that mushrooms are easily damaged while in transit, United Foods only sells its mushrooms in local markets in close proximity to one of the company's three mushroom farms.

brand name, trade name, or State or regional identification of any mushrooms or mushroom product." 7 C.F.R. § 1209.40(d).

The Council currently collects assessments from roughly 150 commercial producers and spends about one million dollars a year to promote the consumption of mushrooms. See Michael Doyle, "Mushroom Battle Over Ads Coming to a Head," *Fresno Bee* (Jan. 4, 2001) at C1. Among recent promotional efforts, the Council recently partnered with Ernest and Julio Gallo Wineries for a joint advertising campaign. The campaign featured supermarket floor displays enticing consumers to purchase fresh mushrooms as well as selected Gallo wines. "Mushroom Council, Winery in Joint Promotion," *Supermarket News* (Feb. 21, 2000) at 50. The Council also mounted a Valentine's Day initiative depicting mushrooms as aphrodisiacs. Wendy Davis & Ira Teinowitz, "Top Court to Eye Co-op Ads", *Advertising Age* (Dec. 4, 2000) at 1.

In 1996, United Foods refused to pay the monthly assessment levied by the Mushroom Council and filed a petition with the Secretary of Agriculture claiming that the federal government's compelled assessment program violated its First Amendment rights. United Foods principally objected to the assessments because it contended that the Council's advertising campaign undermined the company's own promotional efforts. While United Foods' marketing campaign sought to convince consumers that the company's "Pictsweet" mushrooms were better than the other mushrooms offered for sale in the marketplace, the Council's advertising campaign suggested a conflicting message: mushrooms were a generic, homogenous product.

The company also has ethical objections to some of the Council's activities. In particular, United Foods supports neither the Council's decision to associate mushrooms with the consumption of alcohol through its joint promotion with Gallo wines nor the Council's Valentine Day's campaign portraying mushrooms as aphrodisiacs.[3]

The United States responded to the company's petition by filing suit in the United States District Court for the Western District of Tennessee, seeking to require the company to pay its assessments, which totaled approximately $8,000 a month.[4] The Department of Agriculture subsequently ruled against the company, and United Foods then filed its own complaint in federal district court attacking the constitutionality of the assessments.[5]

In 1998, the district court upheld the constitutionality of the compulsory assessments. See *United States v. United Foods, Inc.*, No. 98-01082, slip op. (W.D. Tenn. July 31, 1998). The U.S. Court of Appeals for the Sixth Circuit, however, reversed a year later, holding that the use of compulsory assessments for generic mushroom advertising violated United Foods' First Amendment rights. See *United Foods, Inc. v. United States*, 197 F.3d 221 (1999). This Court has granted *certiorari* to review the Sixth Circuit's

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[3] United Foods also complains that the Council's advertising campaign is ineffective because it is too small and insufficiently tailored to local conditions to have any effect on the marketplace.

[4] Wendy Davis & Ira Teinowitz, "Top Court to Eye Co-op Ads," *Advertising Age* (Dec. 4, 2000) at 1.

[5] This suit was consolidated with the action brought by the United States against United Foods.

ruling. See *United States v. United Foods, Inc.*, 121 S. Ct. 562 (2000).

SUMMARY OF ARGUMENT

This Court should subject the mandatory assessments imposed by the federal government on selected mushroom producers to First Amendment scrutiny and affirm the judgment of the Sixth Circuit striking down the compulsory assessment program as a violation of the First Amendment.

In a long line of cases beginning with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), this Court has ruled that commercial speech is entitled to First Amendment protection. This Court's precedents further make it clear that the generic mushroom advertisements at issue in the instant case constitute protected commercial speech and that spending money for the purpose of disseminating such advertising is also protected by the First Amendment. So, for example, if the federal government sought to forbid United Foods from paying for advertisements for its own "Pictsweet" mushrooms, such a law under this Court's jurisprudence would be subject to heightened First Amendment scrutiny pursuant to the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980).

In another long line of cases beginning with *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court has also recognized that the First

Amendment guards against government attempts to compel speech as well as attempts to compel silence, and that any distinction between the two is not of constitutional significance. As a result, since government efforts to forbid an agricultural producer from paying for its own advertising would be subject to First Amendment scrutiny, a government mandate requiring a producer to financially support others' advertising should trigger First Amendment scrutiny as well.

In *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), however, this Court avoided the logical consequence of its commercial speech and compelled speech precedents and held that agricultural producers could be required to fund advertising and then to cede editorial control over the commercial message. It reasoned that being required to make contributions for others' speech does not implicate the First Amendment so long as the speech in question is neither political nor ideological. This Court also suggested that to state a viable compelled speech claim under the First Amendment, an objecting party must disagree with the message contained in the speech it is being required to support.

Amicus respectfully suggests that this Court should abandon its holding in *Glickman*. This Court's refusal to apply First Amendment scrutiny to the compelled financing of expressive speech without a political or ideological message implies disturbing consequences and finds no support in this Court's pre-*Glickman* precedents. It represents a marked departure from this Court's holdings that the distinction between compelled speech and compelled silence is of no constitutional significance and that its

compelled speech jurisprudence applies in the commercial context. Similarly, this Court's suggestion that a viable First Amendment claim requires an objector to disagree with the message it is being compelled to support is wholly at odds with this Court's pre-*Glickman* jurisprudence. Moreover, the Court's assumption in *Glickman* that agricultural producers will not disagree with the message relayed by generic advertising campaigns is entirely inaccurate. In this case, for instance, United Foods disagrees with the message of product homogeniety conveyed by the Mushroom Council's generic advertising campaign.

This Court should therefore abandon *Glickman* and apply heightened First Amendment scrutiny to the mandatory assessments at issue in the instant case. And because the assessments fail to pass constitutional muster under either the *Central Hudson* test or the strict scrutiny *amicus* believes should apply to commercial speech restrictions, the judgment of the Sixth Circuit should be affirmed.

ARGUMENT

I. TRUTHFUL SPEECH PROMOTING MUSHROOM CONSUMPTION IS PROTECTED BY THE FIRST AMENDMENT.

This Court's jurisprudence leaves no doubt that the First Amendment safeguards a corporation's ability to advertise agricultural products, such as mushrooms. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, this Court made it clear that commercial

speech enjoys robust First Amendment protection, invalidating a Virginia statute prohibiting licensed pharmacists from advertising prescription drug prices. In this landmark ruling, it noted that the "free flow of commercial information is indispensable" to the functioning of our free enterprise economy, 425 U.S. at 765, and observed that "a consumer's interest in the free flow of commercial information" may be greater "than his interest in the day's most urgent political debate." *Id.* at 763.

Four years after *Virginia State Board of Pharmacy*, in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980), this Court once again reaffirmed that commercial speech enjoys First Amendment protection by striking down as unconstitutional a New York regulation banning promotional advertising by electric utilities. In so doing, this Court formulated a four-part test for evaluating the constitutionality of commercial speech restrictions:

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the government interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

The Court has since applied the *Central Hudson* test in finding that a variety of commercial speech restrictions violate the First Amendment. See, e.g., *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S.

173 (1999) (invalidating federal statute prohibiting radio and television stations from broadcasting advertisements for lawful casino gambling); *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (striking down state ban on price advertising of liquor); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (invalidating federal regulation prohibiting beer labels from displaying alcohol content); *Edenfield v. Fane*, 507 U.S. 761 (1993) (striking down regulation banning in-person solicitation by certified public accountants).

From a constitutional standpoint, it makes no difference whether an advertiser is an individual or a corporation. This is because First Amendment protection does not depend on the legal status of a speaker, "whether corporation, association, union, or individual." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

This Court has also recognized that the First Amendment would be little but an empty formalism if the government allowed a citizen the freedom to speak but forbade him from paying others to produce or disseminate his or her speech. In *Central Hudson*, for example, upon closer examination it is clear that this Court more specifically held that a utility's expenditures for advertising constituted commercial speech protected by the First Amendment; in that case, the utility itself was not literally speaking but instead incurring "advertising expenses." See 447 U.S. at 559. See also *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (corporate expenditures for advertising on referendum protected by First Amendment); *Buckley v. Valeo*, 424 U.S. 1 (1976) (contributions and expenditures for political advertising trigger First Amendment scrutiny).

Pulling together these disparate strands of First Amendment jurisprudence and applying them to the instant case, one conclusion is apparent: if this case involved a federal regulation restricting United Foods' ability to pay for the truthful advertising of its own "Pictsweet" mushrooms, First Amendment scrutiny would obviously be triggered. See, e.g., *Glickman*, 521 U.S. 457, 469 n.12; *id.* at 505 (Thomas, J., dissenting). As we argue below, the fact that it *requires* respondent to pay for speech creates no constitutional distinction.

II. THE GOVERNMENT'S POWER TO COMPEL SPEAKERS TO PROMOTE MUSHROOM CONSUMPTION IS RESTRICTED BY THE FIRST AMENDMENT.

"The right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This bedrock First Amendment principle was first established in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), when this Court ruled that the government could not compel individuals to salute the flag.

Since then, this Court has consistently held that the First Amendment restricts the government's ability to compel speech in the same manner as it restricts the government's power to censor speech. See *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without

constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say") (emphasis in original); see also *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995) (holding that government cannot compel parade organizers to include marchers representing message organizers do not wish to have expressed); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (striking down requirement that political pamphleteers identify themselves in their literature); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a state may not compel individuals to display state motto on their automobile license plates); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating statute requiring newspaper to give space to political candidates to reply to criticism contained in the newspaper).

Given that commercial speech is protected under the First Amendment, it is not surprising that this Court has held that compelled commercial speech similarly triggers First Amendment scrutiny. In *Ibanez v. Florida Department of Business*, 512 U.S. 136 (1994), for example, the Court struck down a Florida law requiring accountants to supply a lengthy disclaimer whenever advertising any private certifications they had obtained. Concluding that the law abridged the right to free speech, it held that the detailed disclaimer was not "appropriately tailored" to serving the state's alleged interest in preventing consumer deception and that the state had not even demonstrated that any disclaimer was necessary to protect consumers. *Id.* at 146-47.

To be sure, from the beginning of its modern commercial speech jurisprudence, this Court has explicitly noted that the First Amendment does not forbid the government, under certain circumstances, from requiring advertisers to include specified information or disclaimers in their promotional materials. See *Virginia Pharmacy*, 425 U.S. at 771 n.24. When it has approved of the constitutionality of such compelled commercial speech, however, the Court before its *Glickman* decision four years ago had always cited as its justification the state's interest in preventing consumer deception. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (affirming the constitutionality of a mandated disclaimer in lawyer advertisements promoting contingency-fee arrangements on the grounds that the ads otherwise had a "self-evident" propensity to deceive consumers).[6] As the California Supreme Court has stated, "The First Amendment's right to freedom of speech allows compelling one who engages in commercial speech to say through advertising what he otherwise would not say, even about a lawful product or service, in order to render his message truthful and not misleading. Consumer protection is the justification [for compelled commercial speech] – apparently, the sole one." *Gerawan Farming, Inc. v. Lyons*, 12 P.3d 720 (Cal. 2000) (citing, among other cases, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492-93 (1995) (Stevens, J., concurring)).

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[6] Strangely, this Court in *Glickman* did not cite *Ibanez*, *Zauderer*, or any other prior case implicating compelled commercial speech.

This "consumer deception" exception in the area of compelled commercial speech is arguably quite consistent with the first prong of the *Central Hudson* test used to scrutinize commercial speech restrictions. Just as the *Central Hudson* test does not prevent the government from restricting misleading or untruthful commercial speech, it makes sense as a corollary to allow government to compel certain commercial speech for the purpose of ensuring that accompanying commercial speech is not deceptive.

Applying this Court's jurisprudence to the mushroom industry, it is thus apparent that while the federal government could require United Foods in certain instances to include information in its advertisements to prevent consumer deception, it certainly could not require the company to launch its own advertising campaign if United Foods preferred not to promote its products. The First Amendment protects the company's freedom not to advertise as well as its liberty to advertise.

III. MANDATORY ASSESSMENTS FOR GENERIC ADVERTISING CAMPAIGNS SHOULD TRIGGER FIRST AMENDMENT SCRUTINY.

Because the First Amendment protects both the right to fund speech and the right to refrain from speaking, this Court has long recognized that government efforts to require private individuals or entities to financially support the private speech of others implicate First Amendment concerns. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), for example, this Court held that a teachers' union could not use the "agency fees" paid by

objecting non-members to fund the union's political speech. Rather, it ruled that compelled payments could be used only for activities germane to the collective bargaining process. *Id.* at 235-36. The Court reasoned that being compelled to fund the speech of others "works no less an infringement of . . . constitutional rights" than being prohibited from making such expenditures. *Id.* at 234. Thomas Jefferson foreshadowed this Court's decision in *Abood* almost two hundred years before when he wrote, "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), reprinted in 5 *The Founders' Constitution* (Kurland & Lerner eds., 1987).

In decisions since *Abood*, this Court has continued to carefully limit government's ability to levy compulsory assessments for the funding of private speech. For instance, this Court has gone on in the labor union context to extend its *Abood* holding to prohibit the use of "agency fees" for non-political and non-ideological speech that is not germane to the collective bargaining process. It has held that to survive First Amendment scrutiny, such assessments must be used for activities germane to a legitimate regulatory scheme, justified by a vital policy interest of the government, and not add significantly to the burdening of free speech inherent in achieving those interests. See, e.g., *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991) (disallowing, among other expenditures, the use of compelled funds to finance a public relations campaign to enhance the reputation of the teaching profession).

Given the *Abood* line of cases as well as cases such as *Ibanez*, which make it clear that the First Amendment's concern with compelled speech extends to the commercial context, one would think that the use of mandatory assessments to fund commercial speech would similarly trigger First Amendment scrutiny. In *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), however, this Court reached the opposite conclusion, holding that a compelled levy used to fund a generic advertising campaign for California tree fruits was merely "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress," *id.* at 477, and not one that "warrant[ed] special First Amendment scrutiny." *Id.* at 474.

Amicus respectfully suggests that the holding in *Glickman* is an aberrant outlier from the main body of this Court's compelled speech jurisprudence as well as its commercial speech jurisprudence and should therefore be overturned.[7] The reasoning underlying *Glickman* is unpersuasive, based on inaccurate assumptions, and, if applied in future cases, holds the potential to seriously undermine fundamental First Amendment freedoms.

To be sure, *stare decisis* is an important "principle of policy." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63 (1996). However, "[w]hen governing decisions are unworkable or badly reasoned, this Court has never felt

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[7] *Amicus* does not express a view as to whether this Court's holding in *Glickman* extends only to those segments of the agricultural economy extensively regulated by the federal government.

constrained to follow precedent." *Id.* (internal quotations and citations omitted). This is "particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.' " *Id.* (internal quotations and citations omitted).

Examining the primary justifications used by this Court in *Seminole Tribe* for deciding to overrule *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), *amicus* suggests that these same factors counsel this Court to overrule *Glickman* in the instant case. Just as "*Union Gas* . . . proved to be a solitary departure from established law," *Seminole Tribe*, 517 U.S. at 66, so too has *Glickman* proven to be an isolated departure from this Court's First Amendment jurisprudence. In not a single decision since *Glickman* was issued, has this Court cited to its majority opinion. Similarly, just as "*Union Gas* . . . created confusion among the lower courts seeking to understand and apply the . . . decision," *id.* at 64, so too have lower courts come to differing conclusions as to the rationale underlying this Court's decision in *Glickman*. Compare *United Foods*, 197 F.3d at 221 (failure to subject assessments to First Amendment scrutiny dependent upon collectivization of California tree fruit industry) and *Gallo Cattle Co. v. California Milk Advisory Bd.*, 185 F.3d 969, 975 (9th Cir. 1999) (same), with *Goetz v. Glickman*, 149 F.3d 1131 (10th Cir. 1998) (applying opposite interpretation of *Glickman* in the context of the unregulated beef industry).

Most importantly, however, just as the "plurality's rationale [*in Union Gas*] . . . deviated sharply from [this Court's] established federalism jurisprudence," *Seminole Tribe*, 517 U.S. at 64, so too did the majority's rationale in

Glickman deviate dramatically from this Court's established compelled speech and commercial speech jurisprudence.

To begin with, this Court declined to subject the mandatory assessments in *Glickman* to First Amendment scrutiny because it claimed they were not used to fund the dissemination of "any political or ideological views." *Glickman*, 521 U.S. at 469-70. This distinction, however, is sharply at odds with other areas of this Court's compelled speech jurisprudence. In the labor union context, for instance, this Court has applied First Amendment scrutiny to assessments imposed for non-political and non-ideological activities, holding them to be unconstitutional if not germane to collective bargaining. See *Lehnert*, 500 U.S. at 511-19; see also *Ellis v. Brotherhood of Railway, Airline, and Steamship Clerks*, 466 U.S. 435, 444-55 (1984) (interpreting statute in a similar manner so as to avoid constitutional difficulties); *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 298-302 (1st Cir. 2000) (summarizing this Court's jurisprudence with respect to this issue).

The majority's reasoning in *Glickman* is similarly inconsistent with this Court's holding in *Riley* that the difference between "compelled speech" and "compelled silence" is one "without constitutional significance." 487 U.S. at 796-97. When reviewing restrictions on the ability of private individuals or entities to fund speech, this Court has never suggested that restrictions aimed at only certain types of speech trigger First Amendment scrutiny while those targeting other types of speech do not. It does not matter whether the government is restricting one's ability to fund political, artistic, or commercial speech; all

restrictions must survive some type of First Amendment scrutiny.

Therefore, by refusing to subject the compelled funding of commercial speech to any First Amendment scrutiny whatsoever, *Glickman* marks a significant departure from this Court's steadfast refusal to make a distinction between compelled speech and compelled silence. If the government attempted to forbid an agricultural producer from funding its own advertising campaign, there is no question that First Amendment scrutiny would apply.

In *Glickman*, this Court suggested that the link between money and speech is somehow different in the compelled speech context than it is in the realm of speech restraints. Referring to the mandatory assessments paid by those in the California tree fruit industry, it stated, "Respondents are not required themselves to speak, but are merely required to make contributions for advertising." 521 U.S. at 471. But applying the logic of this statement to a hypothetical situation involving a government regulation forbidding corporations from purchasing advertising reveals its obvious flaw, for this Court would certainly never suggest that such a restriction did not trigger First Amendment scrutiny because: "Respondents are not forbidden from speaking, but are merely forbidden from paying for advertising."

Given this Court's current commercial speech jurisprudence, any effort to subject compelled payments for commercial speech to a different level of scrutiny than compelled payments for political or ideological speech must be linked to the government's interest in ensuring that consumers are not deceived. As Justice Stevens has

noted, "any description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead." *Rubin*, 514 U.S. at 494 (Stevens, J., concurring). Here, however, it is obvious that neither the mandatory assessment at issue in *Glickman* nor the one under attack in the instant case has any relationship to remedying consumer deception or countering untruthful advertising. Rather, they are generally designed to stimulate demand for agricultural products. See, e.g., 7 C.F.R. § 1209.39(l) (purpose of generic mushroom advertising program is to "strengthen the mushroom industry's position in the marketplace").[8]

In *Glickman*, this Court also justified declining to subject mandatory assessments to First Amendment scrutiny by reasoning that the compelled commercial speech did not engender any "crisis of conscience" among tree fruit producers. *Glickman*, 521 U.S. at 472. It noted that "[n]one of the advertising in this record promotes any particular message other than encouraging consumers to buy California tree fruit." *Id.* The Court then concluded that "since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program." *Id.* at 470.

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[8] Indeed, depending upon one's view of whether mushrooms are aphrodisiacs, it could be argued that respondent is being forced to contribute to misleading advertising.

But this justification for refusing to apply First Amendment scrutiny to mandatory assessments for generic advertising programs again suffers from at least two flaws. First, it introduces a new qualification nowhere previously found in this Court's compelled speech jurisprudence: In order to state a compelled speech claim under the First Amendment, one must disagree with the message one is being required to support. Before *Glickman*, this Court had never before held that such a showing was necessary in order to advance a viable compelled speech claim. Indeed, if such a requirement were part of this Court's compelled speech jurisprudence, it is likely that many prior cases would have been decided differently. See, e.g, *Riley*, 487 U.S. at 797-98 (striking down compelled disclosure of facts).

The First Amendment is premised on the notion that government may not compel a citizen to speak, whether he or she agrees with, disagrees with, or has no opinion regarding the message he or she is being forced to relay. An American need not reveal his or her views on an issue in order to preserve his or her First Amendment rights. To avoid being compelled to salute the flag, for instance, it is not necessary to show that you disagree with the message conveyed by saluting the flag. A patriotic American who may regularly salute the flag in private retains the right to refrain from doing so in public under threat of government sanction. See, e.g., *Barnette*, 319 U.S. at 635.

Besides having no legal relevance, however, the Court's no "crisis of conscience" justification is based on a fundamentally erroneous premise. As the instant case

demonstrates, agricultural producers can very easily disagree with the message that is conveyed through generic advertising programs. United Foods' advertising campaign, for instance, conveys the message of product differentiation, seeking to persuade consumers to purchase its "Pictsweet" mushrooms rather than other mushrooms in the marketplace. Implicit in the company's marketing efforts is the message that "Pictsweet" mushrooms are better than other mushrooms consumers may choose to purchase. The generic mushroom advertising that is funded by the Mushroom Council, however, undermines this message. Generic advertising portrays products as "indistinctive" in spite of brand. See Comment, *The Effect of* Glickman v. Wileman Brothers & Elliott, Inc. *on Non-generic Commodities*, 9 San Joaquin Agric. L. Rev. 95, 113 (1999). These promotional efforts imply that mushrooms are a homogenous product and that one brand of mushrooms is as good as another.

Moreover, generic advertising can easily implicate political or ideological issues, leading producers to experience what might be seen as a more paradigmatic "crisis of conscience." In one recent Ninth Circuit case, for instance, a dairy producer objected to the fact that it was being compelled to financially support a generic advertising campaign promoting the use of bovine growth hormone (BGH). See *Gallo Cattle Co. v. United States Dep't of Agriculture*, 1999 U.S. App. LEXIS 17959 at *3 (9th Cir. July 27, 1999). Despite the fact that use of BGH is currently a very controversial issue in agricultural policy, see "Maine's Largest Dairy Promoting Hormone-Free Milk," *Associated Press State & Local Wire* (Feb. 19, 2001) BC cycle (reviewing dispute over use of BGH), and that the Ninth

Circuit admitted that the producer may have had legitimate "ideological objections" to use of the hormone, the Ninth Circuit felt compelled by this Court's opinion in *Glickman* to reject the dairy producer's compelled speech claim. See *Gallo Cattle Co.* at *3. Moreover, the facts of the instant case even implicate ideological issues given the Mushroom Council's promotions associating mushroom consumption with sex and alcohol.[9] See *supra* at 3.

An agricultural producer can also disagree with the message conveyed by a generic advertising campaign for another reason as well. As the California Supreme Court also noted, "Generic advertising can be manipulated to serve the interests of some producers rather than others, as by allowing some to develop a kind of brand by means of funds assessed from all and then use it for their own exclusive benefit." *Gerawan Farming, Inc.*, 12 P.3d at 743. "Thus," the Court continued, "in any given case, a producer who objects to generic advertising may not be

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[9] These examples help to demonstrate how this Court's attempt to separate political or ideological speech from other types of speech rests on an artificial distinction. In real life, speech is not so easily categorized, and a rule of law requiring such categorization is bound to be uncertain and difficult to apply. See, e.g., Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627 (1990) (using the example of a company urging consumers to oppose apartheid by purchasing its products as opposed to those of its competitor doing business in South Africa). It is for this reason that *amicus* believes Justice Thomas was correct in *44 Liquormart* when he called for this Court to end its current practice of subjecting restrictions on the spread of truthful commercial information to lower First Amendment scrutiny under the *Central Hudson* test and instead to subject such restrictions to strict scrutiny. See *44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring).

attempting to ride free on the funds of others – a familiar charge – but may merely be making an effort to prevent others from hijacking his own funds as they drive to their own destination." *Id.* Such a phenomenon, in fact, may have occurred in the highly controversial generic advertising program for pork administered by the National Pork Producers Council (NPPC). A Missouri pork farmer's complaint about the use of her compelled payments is typical: "For years, the NPPC has been using our money to represent the interests of corporate factory farms and meatpackers." William Claiborne, "Hog Producers Defeat 'Pork Checkoff,' " *Washington Post* (Jan. 16, 2001) at A2.

The facts of this case underscore the untenable nature of the requisite factual inquiry that would be required under the *Glickman* standard. Here, respondent is being compelled, for instance, not just to fund mushroom advertising but advertising for Gallo wines. It may or may not be that respondent, or others who are compelled to support the advertising, "agree" with the message conveyed. But that is beside the point: surely a business cannot be required to pay for advertising someone else's product. Yet, that is the implication of a precedent that establishes the line of demarcation at whether the compelled speaker "agrees" with the speech. Instead, the bright-line rule should be exactly where it is in all other areas of First Amendment jurisprudence: no one can be required to cede editorial control over a commercial message.

In *Glickman*, this Court asserted that the mandatory assessments for generic tree fruit advertising should be evaluated under the same scrutiny as the other aspects of the federal regulatory scheme applicable to the industry.

See *Glickman*, 521 U.S. at 474 ("We are not persuaded that any greater weight should be given to the fact that some producers do not wish to foster generic advertising than to the fact that many of them may well object to the marketing orders themselves because they might earn more money in an unregulated market"). However, the problem with this argument is again obvious. While regulations regarding uniform prices, production limits, and joint research projects do not implicate speech, compelled assessments for generic advertising programs do, and the First Amendment makes it clear that free speech deserves special protection in our constitutional framework.

In the years since *Glickman*, it has been criticized "with virtual unanimity" across the ideological spectrum. See *Gerawan Farming, Inc.*, 12 P.3d at 743. The California Supreme Court has stated that *Glickman*'s "legal component is driven not so much by principled reasoning as by ad hoc distinguishing." *Id.* Academic commentators have referred to *Glickman* as an "errant aberration" and a "house-of-cards opinion based on a faulty premise." 2 Rodney A. Smolla & Melville B. Nimmer, *Freedom of Speech* (1999) § 20:45, pp. 20-114 to 20-115; Nicole Casarez, *Don't Tell Me What to Say: Compelled Commercial Speech and the First Amendment*, 63 Mo. L. Rev. 929, 960 (1998). See, e.g., Charles Fried, *Perfect Freedom, Perfect Justice*, 78 B.U. L. Rev. 717, 743 n.84 (1998); Comment, Glickman v. Wileman Brothers & Elliott, Inc., *Don't Put Words in My Mouth*, 33 New Eng. L. Rev. 989, 1004-1028 (1999); *The Supreme Court, 1996 Term: Leading Cases*, 111 Harv. L. Rev. 197, 319-29 (1997).

As has been shown, *Glickman* cannot be reconciled with this Court's compelled speech jurisprudence or commercial speech jurisprudence. As such, if not overruled, it will either stand one day as an historical oddity or signify the first step in a significant retrenchment of the protection afforded by the First Amendment's freedom of speech guarantee. Rather than run the risk that the latter will become true, this Court should faithfully apply the logic of its pre-*Glickman* precedents and overrule *Glickman*.

If this Court does overrule *Glickman* and applies First Amendment scrutiny to the challenged mandatory assessments in this case, this Court has little choice but to affirm the Sixth Circuit's judgment that the assessments are unconstitutional. See *Glickman*, 521 U.S. at 491-504 (Souter, J., dissenting). Whether this Court applies its traditional *Central Hudson* test or the strict scrutiny *amicus* believes should be used to evaluate restrictions on the free flow of truthful commercial information, see *supra* at 22 n.9, the mandatory assessments charged by the Mushroom Council for generic mushroom advertising do not even come close to passing First Amendment muster. See *Glickman*, 521 U.S. at 491-504 (Souter, J., dissenting).

CONCLUSION

For all the foregoing reasons, this Court should apply First Amendment scrutiny to the compulsory assessments at issue in the instant case and affirm the Sixth Circuit's judgment that the use of these compelled payments to fund generic mushroom advertising runs afoul of the First Amendment.

Respectfully submitted,

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IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
Petitioners,

v.

UNITED FOODS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF *AMICUS CURIAE* OF THE DKT LIBERTY PROJECT IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS

Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground."[1] Mindful of this trend, The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties, which threaten the reservation of power to the citizenry that underlies our constitutional system.

This case implicates one of the most profound individual liberties, the right to free speech, and the corollary right not to speak. Laws compelling contributions to generic advertising campaigns are of particular concern to the Liberty Project because they undermine this crucial right. Because of the Liberty Project's strong interest in protection of citizens from government overreaching, it is well situated to provide this Court with additional insight into the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641

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[1]Petitioners and respondents both have consented to the filing of this *amicus* brief. Counsel for respondent has informed *amicus* that a letter of consent has previously been filed with the Court. Petitioner's letter of consent is being lodged with the Clerk. Pursuant to this Court's Rule 37.6, *amicus* attests that no counsel for a party had any role in authoring this Brief, and no outside party has made a monetary contribution for its preparation or submission.

(1994). Compelling persons to fund speech violates this basic principle.

The Court therefore has consistently subjected compelled speech, including compelled contributions, to rigorous scrutiny under the First Amendment. The government's suggestion that *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), categorically exempts all compelled contributions used to fund non-ideological speech from the First Amendment is belied by both the factual context of *Wileman* and the Court's caselaw involving compelled contributions.

First Amendment scrutiny of the compelled contributions here requires invalidating them, and this reading is consistent with *Wileman*. The Department of Agriculture's requirement that mushroom producers contribute funds to support the generic advertising of mushrooms does not serve a substantial governmental interest and is not narrowly tailored to serve even the government's alleged interest.

ARGUMENT

I. THE FIRST AMENDMENT REQUIRES RIGOROUS SCRUTINY OF ALL COMPELLED CONTRIBUTIONS.

This Court should apply rigorous First Amendment scrutiny to compelled contributions used to support both non-ideological and ideological speech. Although *Wileman* noted that the advertising at issue in that case was non-ideological, that characterization was not fundamental to the decision. In no other area of First Amendment law has the Court ever created a line between ideological and non-ideological speech, much less concluded that non-ideological speech is exempt

from First Amendment scrutiny altogether. That is for good reason.

A. Distinguishing Between Ideological and Non-ideological Speech Is Not Supported By First Amendment Principles or Precedents.

In light of the absolute language of the First Amendment, this Court has only very rarely exempted categories of speech from its scope. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). Thus, the Court has determined that fighting words, obscenity and libel fall outside the purview of the First Amendment. But it has never suggested that an extremely broad, vitally important category of speech such as non-ideological speech, is similarly exempted from First Amendment protection. To the contrary, it has recognized that "[a]ll ideas having even the slightest redeeming social importance. . . have the full protection of the guaranties [of the First Amendment]." *Roth v. United States*, 354 U.S. 476, 484 (1957). *See also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected."); *Winters v. New York*, 333 U.S. 507, 510 (1948) ("What is one man's amusement, teaches another doctrine."). Clearly, much "non-ideological" speech is of fundamental social importance – including art, science, history and everyday conversation. Concluding that such speech is outside the purview of First Amendment protection would radically alter the scope of that protection.

Moreover, the distinction between ideological and non-ideological speech may be impossible to define and, in *Wileman*, the Court makes no attempt to do so. Perhaps the Court viewed non-ideological speech as synonymous with commercial speech. But commercial speech often has

significant ideological implications. Some commercial speech implies that conspicuous consumption is an important component of a good life, for example. Some commercial speech implies that the appropriate role for women is to stay at home to raise children, while other commercial speech suggests that women should seek fulfilling careers and the clothes that go with them. Thus, any line drawn to exempt commercial speech would necessarily exempt some speech that is actually ideological. And, in any case, the drawing of such a line is precluded by the Court's repeated conclusion that commercial speech is protected by the First Amendment. *See, e.g, Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). The *Wileman* Court certainly did not purport to alter this fundamental conclusion.

Nor would it be consistent with this Court's precedents to carve out a more limited First Amendment exemption for compelled contributions used to fund non-ideological speech. It is well-settled that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The Court has emphasized that the "difference between compelled speech and compelled silence . . . is without constitutional significance." *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). *See also West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943); *Turner*, 512 U.S. at 642. Under this principle, a law that compels speech is subject to the same analysis as one that prohibits speech. Thus, for example, if the First Amendment applies to a law prohibiting citizens from contributing money to scientists to discuss electromagnetic

power, it must also apply to laws compelling contributions to those scientists.

Moreover, this Court's compelled contribution caselaw itself demonstrates that compelled contributions used to support non-ideological speech *are* subject to rigorous First Amendment scrutiny, because they implicate two fundamental First Amendment interests. First, compelled contributions may force individuals to support speech with which they do not wish to be associated. This is so regardless of whether the individuals agree with the message being advanced. For example, the First Amendment would likely preclude supporters of a particular political candidate from being compelled to contribute to that candidate even though they agreed with the candidate's message. The same is true with non-ideological speech. Individuals (or companies) have an interest in choosing the messages with which they wish to be associated whether or not the messages are ideological. *See, e.g.*, *Riley*, 487 U.S. at 797-8 (holding that compelled statements of fact violated First Amendment).

Second, compelled contributions may force individuals to support speech with which they disagree and thus "invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to . . . reserve from all official control." *Barnette*, 319 U.S. at 642. Once again this is true of non-ideological as well as ideological speech. For example, Georgia peach growers are likely to disagree vehemently with an advertising program that promotes the superiority of California peaches. A public health organization is likely to disagree with a non-ideological advertising program designed to promote candy consumption. And some parents are likely to disagree with a non-ideological program explaining the science of evolution. Indeed, even when those compelled to contribute

may expect to benefit economically from success of a particular advertising campaign, it cannot be presumed that they will agree with the message articulated. A socially conscious tobacco company might economically benefit from a tobacco advertising program aimed at children, for example, but might strongly disagree with such a campaign. A mushroom grower who appears to benefit economically from a generic mushroom advertising campaign might disagree that an increase in mushroom consumption generally – as opposed to consumption of its mushrooms in particular – is beneficial for American consumers or might have strong objections to the very notion of a collective advertising campaign. Indeed, the Court need look no further than this case. United Foods objects to the Mushroom Council's collective mushroom advertising campaign because the campaign associates mushrooms with consumption of alcohol, touts mushrooms as an aphrodisiac, and suggests that all mushrooms are equivalent. Op. Cert. at 4.[2] This is not disagreement with a strategy – this is disagreement with ideas.

Of course, it may happen that those compelled to fund particular speech might all agree with that speech.[3] And it may

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[2] Moreover, as will be shown *infra*, this Court has already rejected the notion that compelled contributions are exempt from First Amendment scrutiny whenever they are used to fund speech that appears consistent with the economic interests of those forced to contribute. For example, teachers cannot be compelled to support an advertising campaign designed to enhance the reputation of teachers and thus create public support for an increase in teacher salaries. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528-29 (1991) (plurality); *see also id.* at 559 (Scalia, J., concurring in part).

[3] *Wileman* pointed to the fact that the fruit growers forced to contribute to the advertising campaign at issue in that case did not disagree with the message of the campaign. 521 U.S. at 467-68. But to the extent this was

even be true that those compelled to fund may more often agree with non-ideological speech than with ideological speech. But this kind of rule of thumb cannot support categorically exempting non-ideological speech from First Amendment scrutiny.

Nor should this Court adopt a rule that exempts compelled contributions from First Amendment scrutiny when those compelled to contribute do not disagree with the message. Case-by-case inquiry into the views of those objecting to compelled contributions would itself compel speech in violation of the First Amendment. Because of just this concern, the Court has determined that a plaintiff can make out a compelled contribution claim merely by asserting a general objection to the compelled contribution:

> To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure. It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative.

Abood v. Detroit Board of Educ., 431 U.S. 209, 241 (1976). *See also Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 n.16 (1986) ("The nonmember's burden is simply the obligation to make his objection known.") (quotation omitted). Finally, if the constitutionality of compelled contributions

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true, it was a function of the particular contributors, not a function of the type of speech.

depended on the potentially changing views of those compelled to contribute, a statute that was constitutional one moment could become unconstitutional the next. Neither legislatures nor judges could ever settle the question of constitutionality.

Thus, both First Amendment principles and precedents support the conclusion that all compelled contributions, not just those used to fund ideological speech, are subject to First Amendment scrutiny. That conclusion is also supported by the Court's specific caselaw on compelled contributions both before and after *Wileman*.

B. The Court's Compelled Contribution Caselaw Before *Wileman* Requires Rigorous Scrutiny of Non-ideological Speech.

In compelled contribution cases prior to *Wileman*, the Court referred to some speech as ideological and suggested that other speech was less ideological, or even non-ideological. But it never held that compelled contributions could be used to support non-ideological speech without First Amendment scrutiny. To the contrary, the Court always demanded that the compelled contributions serve a substantial (or even compelling) governmental interest and be narrowly tailored to serve that interest.

For example, in *Abood*, which concerned compulsory payment of union dues, the Court drew a line between "collective-bargaining activities" and "ideological activities unrelated to collective bargaining." 431 U.S. at 236. The Court viewed collective bargaining largely as a form of conduct with an expressive component, rather than pure speech. And it understood that collective bargaining generally aimed to promote the economic interests of union members -- making it

less likely to conflict significantly with the ideological views of those members.[4] Despite viewing collective bargaining activities as largely non-ideological, the Court nevertheless recognized that important First Amendment interests were at stake in compelling individuals to contribute to such activities. *Abood*, 431 U.S. at 222. *See also Hudson*, 475 U.S. at 301. Thus, even with respect to compelled contributions used to support collective bargaining activities, as opposed to "ideological activities unrelated to collective bargaining," the Court recognized First Amendment limitations.

The Court first evaluated the governmental interests at stake to determine whether they were sufficiently weighty to justify infringing on First Amendment rights. It noted that there were "important government interests" served by compulsory contributions supporting collective bargaining, including industrial peace, stable labor relations and the advancement of collective goals of unionized employees. *Abood*, 431 U.S. at 224. The importance of these goals was underscored by the entire framework of the system of labor relations that showed that in the labor arena government

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[4] The Court knew that individual employees might object to particular collective bargaining activities or to unionism itself, *Abood*, 431 U.S. at 222, but believed that "discussion by negotiators regarding the terms and conditions of employment," was far less "likely to concern topics about which individuals hold strong personal views" than lobbying or electoral speech. *Lehnert*, 500 U.S. at 521. The Court thus clearly viewed collective bargaining activities as non-ideological, or at least much less ideological than lobbying or electoral speech. *See Abood* 431 U.S. at 237 (contrasting subsidization of collective bargaining with subsidization of ideological activities); *id.* at 235 (individual potentially can be compelled to support collective bargaining activities but cannot be compelled "to contribute to the support of an ideological cause he may oppose."); *Lehnert*, 500 U.S. at 516 (collective-bargaining functions "do not include political or ideological activities.").

believed it necessary to subordinate the interests of individual employees to the collective interests of the employees as a whole. *Id.* at 221 n.15. Based on this evidence, the Court concluded as it had in earlier cases "that such interference [with First Amendment rights] as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Id.* at 222. *See also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 516, 520-21 (1991) (plurality); *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435, 455-56 (1984) ("[By] allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights. . . . It has long been settled that such interference with First Amendment rights is justified by the governmental interest in industrial peace.").

But an important governmental interest was not enough. The *Abood* Court also evaluated whether the law compelling contributions was narrowly tailored to serve the government's interests. Thus, only the union dues that were necessarily related (or "germane") to collective bargaining activities could be compelled. 431 U.S. at 235-36. Similarly, in *Hudson*, the Court explained that

> although the government interest in labor peace is strong enough to support an 'agency shop' notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement.

475 U.S. at 302-03 (footnote omitted). *See also id.* at 303 n.11 (citing First Amendment cases regarding the need for narrow tailoring, including cases that applied strict scrutiny). And in

Lehnert, the Court explicitly held that compelled contributions had to serve a "vital policy interest" and be narrowly tailored to serve that interest. The Court explained that "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of speech that is inherent in the allowance of an agency or union shop."[5] 500 U.S. at 518-19.[6]

This First Amendment analysis of compelled contributions applies to non-ideological speech outside the labor context as well. In *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Court applied this analysis to mandatory dues collected by a state bar association. The Court distinguished between activities that served "the State's interest in regulating the legal profession and improving the quality of legal services," such as

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[5] The second prong of the test merely re-emphasized the conclusion implicit in the first prong: compulsion must facilitate collective bargaining and thus serve the government's interest in labor peace and avoiding free riders. The third prong underscored the importance of narrow tailoring. If the activities funded by the compulsory payment differed significantly from core collective bargaining activities, and thus imposed a burden on speech not inherent in allowance of a union shop, the compulsory payment was impermissible.

[6] The rigorous nature of this test is underscored by the fact that the Court has applied it to speech it viewed as political. In *Abood*, the Court recognized that the collective bargaining activities at issue might have more ideological and political content than ordinary collective bargaining because the union was a public sector union. Yet the Court explained that this did not mean that any greater First Amendment interest was at stake. *Abood*, 431 U.S. at 231. Because the collective bargaining activities were germane to the state's important interests, compelled contributions could be used to fund these activities. The substantiality of the government's interest, not the ideological nature of the speech, was central to the analysis.

ethical codes or disciplinary functions, and ideological activities not germane to that interest. *Keller*, 496 U.S. at 13, 16. But the Court did not hold that because the former activities were non-ideological, they were exempt from First Amendment scrutiny. Instead, it determined that they served state interests of equivalent importance to those that justified compelled contributions in *Abood*. *Id.* at 13. The Court also ensured that compelled contributions were narrowly tailored to serve those interests by requiring that they fund only activities germane to those interests. *Id.* at 13-14.

Thus, prior to *Wileman*, the Court consistently applied rigorous First Amendment scrutiny to all compelled contributions. As the Court explained, "our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters – to take a nonexhaustive list of labels – is not entitled to full First Amendment protection." *Abood*, 431 U.S. at 231 & n.28. *See also Lehnert*, 500 U.S. at 521-22 (plurality) ("First Amendment protection is in no way limited to controversial topics or emotionally charged issues."); *id.* at 522 ("we consistently have looked to whether *nonideological* expenses are 'germane to collective bargaining.'") (emphasis added).[7]

Moreover, by rigorously scrutinizing compelled contributions used to support collective bargaining, the Court

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[7] In *Lehnert*, the plurality did say that "the extent of one's disagreement with the subject of compulsory speech is relevant to the *degree* of impingement upon free expression that compulsion will effect," 500 U.S. at 522 (emphasis added), but it acknowledged that all compulsory speech is subject to First Amendment scrutiny. Moreover, as discussed *supra* n.6, in *Abood*, the Court applied the same scrutiny to compelled contributions that funded "political" collective bargaining activities as to other collective bargaining activities.

has rejected the idea that compelled contributions are exempt from First Amendment scrutiny simply because the funded message appears to advance the economic interest of those compelled to contribute. In fact, in *Lehnert*, the Court invalidated a teachers' union's use of compulsory union dues to fund lobbying activities designed to secure funds for public education and to support a public relations campaign designed to enhance the reputation of the teaching profession.[8] *Id.* at 527-29. The Court found that lobbying and public relations efforts were "political" and "[m]ore important, . . . not sufficiently related" to collective bargaining functions to be upheld despite the fact that such activities would likely benefit the economic interests of all teachers. *Id.* at 527-29 (plurality). *See also id.* at 559 (Scalia, J., concurring in part).

C. The Court's Compelled Contribution Caselaw Since *Wileman* Does Not Exempt Non-ideological Speech From the First Amendment.

The Court has applied the same principles in the compelled contribution cases since *Wileman* that it did in the cases prior to *Wileman*. In *Air Line Pilots Ass'n. v. Miller*, 523 U.S. 866, 874 (1998), the Court made clear that the test articulated in *Lehnert* remains the law. Thus, all compelled contributions to unions are subject to rigorous scrutiny. And in *Board of Regents v. Southworth*, 529 U.S. 217 (2000), the Court applied rigorous First Amendment scrutiny to non-ideological speech.

In *Southworth*, the Court considered a challenge to the University of Wisconsin's requirement compelling students to

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[8] The Court suggested that speech that involves public advocacy is ideological. *Id.* at 528-29. Under that criterion, the speech at issue in the instant case (and that at issue in *Wileman*) is also ideological speech.

pay student activity fees that were distributed to a variety of student organizations. Although the Court noted that some of the activity fees were likely used to fund speech particular students found objectionable, *id.* at 230, this finding did not make the University's program an ideological one. "The student contributor . . . has to fund only a distributing agency having itself no social, political or ideological character and itself engaging . . . in no expression of any distinct message. Indeed, the disbursements, varying from year to year are as likely as not to fund an organization that disputes the very message an individual finds exceptionable." *Id.* at 240 (Souter, J., concurring) (footnote and citations omitted).[9]

Despite the non-ideological nature of the University's program, however, the Court concluded that the program raised First Amendment concerns. *Southworth*, 529 U.S. at 231. Consequently, it examined the government purpose, which was to facilitate a wide range of speech, and concluded that it was important. *Id.* The Court then evaluated whether the University's program was narrowly tailored to serve that interest. The Court did not make this assessment by applying the germaneness test of *Abood* and *Keller* but rather by direct evaluation of whether particular aspects of the program were necessary to serve the University's purpose.[10] For example, the Court concluded that use of referenda to make funding decisions did not serve that purpose and thus impinged on First

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[9]Just as a funding program is viewpoint neutral if the criteria used to distribute the funds are viewpoint neutral, regardless of whether the speech that is ultimately funded represents all viewpoints, a funding program is non-ideological if the criteria used to distribute the funds are non-ideological.

[10]The Court explained that it is difficult to apply the germaneness test in a university setting where all speech is likely germane to the goals of the university. *Id.* at 232.

Amendment rights more than was necessary. Majoritarian decisionmaking was not viewpoint neutral and "[v]iewpoint neutrality is the justification for requiring the student to pay the fee in the first instance." *Id.* at 233. *See also id.* at 229 ("The University of Wisconsin exacts the fee at issue for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students. We conclude the objecting students may insist upon certain safeguards.").

The narrow tailoring analysis did not end there. The Court also explored whether the University's program could be altered in other ways to minimize imposition on First Amendment rights. But the Court concluded that the possible alternatives – establishment of an opt out program for dissenting students or using student activity funds only for on-campus activities – would not have enabled the government to serve its significant purposes. *Id.* at 232, 234.

Thus, in *Southworth*, as in *Abood* and its progeny, the Court applied First Amendment scrutiny to compelled contributions to support non-ideological speech and activities.

D. Intermediate Scrutiny Should Be Applied to Compelled Contributions Used to Fund Commercial Speech.

The conclusion that compelled contributions to support non-ideological speech are not exempt from First Amendment protections does not resolve the issue of what level of scrutiny should apply. In *Abood* and its progeny, as well as in *Keller*, the Court required that the supported speech be germane to government interests that were variously described as "vital," "important" or perhaps even "compelling." In *Southworth*, the Court recognized the government's "important and substantial"

interests and required that the program be tailored to serve those interests.

These cases suggest that at a minimum, intermediate scrutiny is required. This is so if the Court simply applies the tests developed in prior compelled contribution cases. It is also so under the Court's general principle that compelled speech is subject to the same scrutiny as prohibited speech. Because the speech at issue here is commercial speech which is subject to at least a form of intermediate scrutiny, *see Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980), compelled contributions that fund commercial speech should similarly be subject to such scrutiny. Under the *Central Hudson* test, restrictions on speech are only justified if they directly advance substantial governmental interests and are no more extensive than necessary to serve that interest. This formulation parallels the compelled contribution caselaw which requires (at least) substantial governmental interests and that the compelled contribution support only those interests.

Nor does *Wileman* require a different result. In *Wileman*, the Court evaluated whether "the assessments used to fund collective advertising, *together with other collective activities*," were in essence economic regulations. 521 U.S. at 469. Because the compelled assessment was but a single part of a complex regulatory system that essentially collectivized the tree fruit industry, and because those compelled to contribute did so "as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme," *id.*, the Court concluded that the assessment was more like an economic regulation. Nevertheless, the Court considered its caselaw relating to compelled contributions to support speech and concluded that

the regulations in *Wileman*, like those in *Abood*, did not violate the First Amendment. In light of the substantial governmental purpose in stabilizing volatile markets, the Court concluded that the collective advertising program was constitutional because it was germane to that purpose and because the alternative of individual advertising would not effectively serve the same purpose. *Id.* at 473, 475.

The conclusion that the collective advertising program at issue in *Wileman* survived First Amendment scrutiny may have made sense in the context of that case. There was little dispute that the market for agricultural products such as tree fruit is extremely variable. Such agricultural products are subject to a multitude of risks including drought, flooding, frost and overproduction. As a result, the government largely collectivized the fruit growing market in order to limit these risks. It exempted the marketing orders from the antitrust laws, and implemented specific regulations governing marketing and sale of the fruit. Thus, as the Court emphasized, "[t]he basic policy decision that underlies the entire statute rests on an assumption that in the volatile markets for agricultural commodities the public will be best served by compelling cooperation among producers in making economic decisions that would be made independently in a free market." *Id.* at 475.

The existence of this cooperative regulatory scheme evidences the seriousness of the government's purpose as to the compelled advertising assessment. It demonstrates government's belief that collectivization is needed not merely to facilitate the economic interests of a particular group but to serve broader public purposes. *See Abood*, 431 U.S. at 223-24 (relying on scheme of collectivized bargaining as support for conclusion that compelled contributions to support such bargaining were constitutional). It also demonstrates that

government did not attempt to serve that purpose by *first* adopting a method that impinged on the First Amendment. *See Greater New Orleans Broadcasting Ass'n*, 527 U.S. at 192 (holding unconstitutional limitations on advertisements related to gambling in part because Congress could have attempted to regulate gambling in other ways *before* doing so by restricting speech). Finally, the fact that the industry is collectivized in so many ways reduces the intrusion on the First Amendment of a collective generic advertising scheme.

In the context of an existing scheme of collectivization in the tree fruit market, it is at least arguable that carefully controlled collective advertising programs may have helped to smooth out demand and may have offset some of the risks inherent in that market. This could have benefitted consumers as well as producers by helping to ensure a steady supply of tree fruit at relatively constant prices. Individual advertising might not have served that same purpose. Because individual advertising is not coordinated, individual advertising might have sent demand too high during times of shortages and too low during times of overproduction. Thus, it may have been reasonable for the Court to conclude that compelled contributions to support collective advertising (in addition to the other collectivist regulations) were narrowly tailored to support a substantial government interest in stabilizing the tree fruit market. Indeed, the Court implicitly reached just this conclusion in explaining that the compelled contributions at issue met the germaneness test articulated in *Abood*.

II. REQUIRING COMPELLED CONTRIBUTIONS FROM MUSHROOM GROWERS VIOLATES THE FIRST AMENDMENT.

The compelled contribution program at issue here cannot survive intermediate First Amendment scrutiny, however. There is no substantial governmental interest justifying compelled contributions from mushroom growers, nor is the government's program narrowly tailored to serve the governmental interests alleged to exist. These conclusions are entirely consistent with the result in *Wileman*.

Unlike the market for tree fruit, the mushroom market is highly stable. Mushrooms are grown inside in controlled environments, and mushroom supply is highly elastic because of the short growing cycle for mushrooms and the low marginal cost of producing additional mushrooms. *See* Op. Cert. at 2 (citing sources). There is no need to collective this market, and the government has not attempted to do so.

Despite the existence of a stable mushroom market and the absence of a collectivized market, the United States asserts that it has legitimate purposes in compelling contributions to support generic mushroom advertising – strengthening the mushroom market, expanding uses for mushrooms, and avoiding free riders. U.S. Br. at 18-20, 25-26. But these purposes – outside the public interest purpose of stabilizing collectivized markets – are not sufficiently substantial to justify infringing First Amendment rights. Nor does the United States assert they are sufficiently substantial, instead relying on its view that the compelled contributions are exempt from First Amendment scrutiny.

With respect to the government's ostensible interest in strengthening the mushroom markets, the United States does not point to anything unique about mushrooms that would show the importance of this interest. If the argument is that the government always has a substantial interest in promoting any commodity – or indeed in promoting any other message it chooses to promote – that would effectively exempt all collective advertising programs on any issue from the First Amendment. Based on this argument, the government could compel all photographers to contribute to an advertising campaign for swimsuit magazines. Or, the government could compel all metal manufacturers to contribute to an advertising campaign promoting gun ownership. The Court has never upheld a compelled contribution scheme based merely on the government's alleged interest in supporting the economic interests of particular companies or individuals.

Moreover, there is no evidence that the collective advertising scheme implemented here even serves the economic interests of mushroom growers. Collective advertising programs may have little effect other than to drive up the price for a particular product by increasing the cost of production without increasing demand for the product (or at least without increasing demand sufficiently to offset the cost of the advertising). And even if they succeed in increasing demand, this may simply decrease demand for competing products which are equally important to the economy and equally good for consumers.

The government's interest in serving the private interests of mushroom growers, unsupported by any evidence, should not even survive the scrutiny accorded to purely economic regulations. It surely cannot justify infringing the First Amendment. Indeed, the government's interest in expanding

the mushroom market is surely no greater than its interest in expanding funds for public education and enhancing the reputation of teachers. Yet the Court struck down compelled contributions to collective advertising programs that supported just those purposes. *See Lehnert*, 500 U.S. at 527-29 (plurality). *See also id.* at 559 (Scalia, J., concurring in part).

As for the government's alleged interest in avoiding free-riders, such an interest has never alone been deemed sufficient to justify compelled contributions. First, if there were no generic advertising program, there would be no free-rider problem. The government cannot create a program without a substantial interest, and then compel speech to solve a problem that would not exist but for the program.[11] Second, whatever free-rider problem exists with compelled advertising programs also existed in the case of the programs designed to fund lobbying activities supporting public education and a public relations campaign on behalf of teachers. Yet this was not found to be sufficient to justify compulsion. As Justice Scalia explained, "private speech often furthers the interest of nonspeakers, and that does not alone empower the state to compel speech to be paid for." *Id.* at 556 (Scalia, J., concurring in part). In contrast, when the Court has found compelled contributions to be permissible under the First Amendment, it has been because it concluded that there was an important reason to avoid free riders, such as protecting industrial peace.

In addition, the compelled contribution program for mushroom growers is not narrowly tailored to advance any

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[11]The compelled contributions do not even fully resolve the free rider problem that is created. Small mushroom growers are exempt from the requirement to contribute and thus are allowed to free ride on larger growers.

interest the government does have in promoting mushrooms. In contrast to the advertising at issue in *Wileman*, there is no reason why the government's alleged interest is better served through a collective advertising program than through individual advertising. And to the extent there is any advantage served by collective advertising, the government fails to explain why that interest is better served through government compulsion than through voluntary advertising programs put together by trade associations, such as the American Mushroom Institute and Western Mushroom Marketing Association, both of which filed *amicus* briefs supporting petitioners. Trade associations often put together generic advertising programs and these mushroom associations could put together such a program as well.[12] The government has not demonstrated any need for compelled contributions supporting collective advertising other than its bare assertion. This is insufficient under the First Amendment.

Finally, in assessing whether the compelled contributions here can satisfy the exacting requirements of the First Amendment, it is perhaps useful to note that the requirement may violate the far less exacting criteria of the Fifth Amendment by taking private property for public use without just compensation. Government generally cannot appropriate money from a select group of individuals unless there is a nexus to services voluntarily used by those individuals, to "commitment[s] that [they] made, or to any injury they have caused." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 537

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[12]Any potential free rider problem could be avoided if the trade associations provided significant benefits to participating mushroom growers, such as listing those mushroom growers in their ads – or pointing consumers to a web site that contained such a list. The trade associations also could develop programs in which they certified the quality of dues paying mushroom growers that met the requisite standards.

(1998) (plurality). *See also Webb's Fabulous Pharamacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) (holding that government could not compel selective contribution to general government revenues). Here, the required nexus is absent. Mushroom growers have not made voluntary use of a government program that would justify exaction of a usage fee. Mushroom growers who do not wish to support generic advertising have no connection with those who do. And mushroom growers have not imposed any cost on society that would justify imposing a special cost on them. To the contrary, the government's view is that mushroom growers are benefitting society by producing mushrooms. Thus, if the purpose of the generic advertising is to encourage the public good of consuming mushrooms, that is a cost which should be borne by all. Alternatively, if the purpose is to help mushroom growers make better choices for themselves – or simply to transfer funds from some mushroom growers to others – there is no public purpose to support the taking.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

UNITED STATES OF AMERICA AND UNITED STATES DEPARTMENT OF AGRICULTURE

Petitioners,

v.

UNITED FOODS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* GERAWAN FARMING, INC., DELANO FARMS, INC., GALLO CATTLE COMPANY, COUNTRY EGGS, ROSEMARY FARMS, BIDART BROS., DUARTE NURSERY, INC., J. PHILIP GILLIGAN d/b/a GILLIGAN GROVES, LUCAS BROS. PARTNERSHIP AND SUSAN NEILL FRESH FRUIT COMPANY IN SUPPORT OF RESPONDENT

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BRIEF *AMICI CURIAE*

Pursuant to Rule 37.3 of the Rules of the Supreme Court of the United States, Gerawan Farming, Inc., Delano Farms, Inc., Gallo Cattle Company, Country Eggs, Rosemary Farms, Bidart Brothers, Duarte Nursery, Inc., J. Philip Gilligan d/b/a Gilligan Groves, Lucas Brothers Partnership and Susan Neill Fresh Fruit Company respectfully submit this brief *amici curiae* in support of the respondent. This brief is presented with the consent of all parties. The required letters of consent have been filed with this brief.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici are California growers and shippers of agricultural products that are required — pursuant to federal or state legislative schemes similar to the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. §§ 6101, *et seq.* — to pay mandatory assessments to commodity-specific boards or commissions for use in generic advertising and promotional programs. These *amici* believe that compelled funding of generic advertising runs afoul of bedrock First Amendment principles.

Gerawan Farming, Inc. is a producer and shipper of table grapes, peaches, plums and nectarines that is required to pay assessments for generic advertising and promotions to the California Table Grape Commission (pursuant to California Food & Agriculture Code §§ 65500, *et seq.*), to the California Tree Fruit Agreement (pursuant to federal marketing orders promulgated under 7 U.S.C. §§ 601, *et seq.*), and to the California Plum Board (pursuant to California Food & Agriculture Code §§ 58601, *et seq.*).

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party to these proceedings authored, in whole or in part, this *amici curiae* brief. No other entity or person, aside from *amici*, made any monetary contribution for the preparation or submission of this brief to this Court.

Delano Farms, Inc. is a grower and shipper of table grapes, the Susan Neill Company is a shipper of table grapes and Lucas Brothers Partnership is a grower of table grapes. All are required to pay assessments to the California Table Grape Commission for generic advertising and promotions pursuant to California Food & Agriculture Code §§ 65500, *et seq*.

Country Eggs and Rosemary Farms are egg producers and shippers that are required to pay assessments for generic advertising and promotions to the California Egg Commission (pursuant to California Food & Agriculture Code §§ 75001, *et seq*.) and to the federally mandated Egg Commission (pursuant to the Egg Research and Consumer Information Act of 1980, 7 U.S.C. §§ 2701, *et. seq*.).

Duarte Nursery, Inc. grows and sells grape rootstocks for wine grapes, table grapes and raisins. It is required to pay assessments to the California Grape Rootstock Improvement Commission, which uses the money for research, publication of that research and for other speech-related activities pursuant to California Food and Agriculture Code §§ 74701, *et seq*.

Bidart Brothers, Inc. is a grower and shipper of various varieties of California apples that is required to pay assessments to the California Apple Commission for use in generic advertising and promotions pursuant to California Food & Agriculture Code §§ 75501, *et seq*.

J. Philip Gilligan, d/b/a Gilligan Groves, grows and markets avocados, and is required to pay assessments to the California Avocado Commission for use in generic advertising and promotions pursuant to California Food & Agriculture Code §§ 67001, *et seq*.

Gallo Cattle Company produces milk that it manufactures into its own world-renowned "Joseph Farms" cheeses. It is required to pay assessments to the California Milk Producers Advisory Board for use in generic advertising and promotions

pursuant to California Food & Agriculture Code §§ 58601, *et seq*.

SUMMARY OF ARGUMENT

The question in this case is whether the government may compel all participants in certain industries to contribute to collective advertising programs unrelated to any non-speech regulatory activity. Under these programs, an industry group, armed with the coercive power of the state, decides who will speak on behalf of the industry, what messages will be presented, and to what audience. It thus violates the fundamental principle embodied in the First Amendment to the United States Constitution that "the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners." *Riley* v. *National Fed'n of the Blind, Inc.*, 487 U.S. 781, 791 (1988).

A collective advertising program was upheld in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997) ("*Wileman*"), but only in the context of an agricultural marketing order that substantially collectivized the marketing of the affected product. In this case, petitioners seek to expand the holding of *Wileman* to permit the government to compel citizens to contribute to collective speech programs of any sort, whether or not related to regulatory programs, with the single limitation that they not be directed at political or ideological objectives. In Section I, we will show that this attempt to broaden the *Wileman* holding is inconsistent with the opinion in *Wileman*, with precedents prior to *Wileman*, and with the logic of the First Amendment. In Section II, we will show that the collectivization of marketing — while it serves the private interests of the dominant players in the industry — disserves the public interest and thus cannot possibly survive heightened scrutiny.

ARGUMENT

I. COMPELLED ADVERTISING PROGRAMS THAT ARE NOT INCIDENTAL TO NON-SPEECH-RELATED REGULATORY PROGRAMS IMPLICATE IMPORTANT FREE SPEECH CONCERNS AND MUST BE ACCORDED HEIGHTENED SCRUTINY

The First Amendment impact of mandatory collective advertising programs may not be as obvious as in the case of ideological or political speech, but to the producers and consumers involved, it is highly significant. This Court has recognized that free speech about products and prices is "indispensable to the proper allocation of resources in a free enterprise system." *Virginia State Bd. of Pharmacy* v. *Virginia Consumer Council*, 425 U.S. 748, 765 (1976). By compelling all producers of a particular commodity to support generic advertising desired by their politically powerful competitors, the government skews the marketplace of ideas in favor of the notion that the products are fungible. This makes it more difficult for producers like *amici*, who cultivate products of unusual quality, to get the word out to members of the public about the importance of differences between products.

We submit that the government has no legitimate interest in favoring one kind of message (generic) over another (product-specific), and that compelling respondent and *amici* to contribute to dissemination of generic advertising is a content-based speech compulsion, which violates the First Amendment. We recognize that because these programs involve commercial rather than political or ideological speech, they may be subject to a lower standard of review than is given to political or to ideological speech. And we recognize that there are times when mandatory collective speech may be a necessary incident to a broader regulatory program. But we urge the Court to extend serious constitutional scrutiny to freestanding programs of compelled commercial speech.

A. This Court's Decision In *Wileman* Must Be Read In Light Of Its Prior Compelled Speech Decisions

In *Wileman*, this Court rejected a First Amendment challenge to certain marketing orders promulgated by the U.S. Secretary of Agriculture under the Agricultural Marketing Agreement Act ("AMAA"), 7 U.S.C. §§ 601, *et seq.*, which compelled California tree fruit producers to fund generic advertising. In reaching that decision, the *Wileman* Court was not writing on a clean slate. It long had been settled that government efforts to compel constitutionally protected speech receive at least the same level of constitutional scrutiny as do government efforts to restrict speech. See, *e.g.*, *Riley*, 487 U.S. at 796-797 ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance"); *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 633 (1943) ("[I]nvoluntary affirmation could be commanded only on even more immediate and urgent grounds than silence."); see also *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n of California*, 475 U.S. 1, 19 (1986) (applying strict scrutiny to commission's order requiring utility to include opponent's messages in utility's billing envelopes); *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 661-662 (1994) (applying the intermediate scrutiny normally applied to content-neutral restrictions of speech to a federal law that compelled cable television companies to carry broadcast signals over their facilities).

Also settled prior to *Wileman* was the principle that government action that coerces financial support for the speech of other private speakers is largely equivalent for constitutional purposes to government action that directly compels a person to speak. See *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 233-235 (1977). The only distinction that this Court had made between the scrutiny to be accorded to forced funding of speech and that to be accorded to compelled speech was made in cases

where the compelled funding was part of a broader regulatory framework that compelled individuals to associate together in pursuit of a vital, non-speech-related governmental objective. In those cases, the Court had held that coerced contributions could survive constitutional scrutiny if they were used for activities "'germane' to the purpose for which compelled association was justified." *Keller* v. *State Bar of California*, 496 U.S. 1, 13 (1990). Thus, in *Abood*, the Court held that non-union members who were statutorily required to participate in an "agency-shop" agreement constitutionally could be compelled to fund "expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment" (431 U.S. at 225-226), all of which served the "important government interests" in labor stability (*id.* at 225). Accord *Lehnert* v. *Ferris Faculty Ass'n.*, 500 U.S. 507, 517 (1991). Similarly, in *Keller*, the Court held that attorneys who, as a condition of practicing law in California, were required to be members of the State's integrated bar could be compelled to provide funding for activities "germane" to the bar's core functions of regulating the legal profession and improving the quality of legal services. See 496 U.S. at 13-14.

Under these precedents — none of which were overruled in *Wileman* — it is apparent that compelled contributions to other private speakers for the purpose of collective commercial speech must be subject to (at least) intermediate scrutiny, unless the compelled speech is incidental to a non-speech-related regulatory program.

Much of the government's brief is devoted to the proposition that the promotion of generic advertising serves the legitimate governmental interest of stimulating consumer demand. See Pet. Br. 21-23, 27-28. This justification is directly speech-related, in that it depends on the communicative impact of the speech. It therefore goes to the core of the First Amendment. No program based on such a justification can be described as mere "economic regulation," or exempted from

heightened scrutiny under the First Amendment. Only if the program is justified on the basis of a necessary connection to a non-speech-related regulatory objective can such a program be subject to any lesser standard of review. Thus, insofar as the government asserts that its interest is simply in promoting a particular message — the generic virtue of certain products — it must fail as a matter of law.

The decision in *Wileman* was consistent with the foregoing precedents. In *Wileman*, the Court "stress[ed] the importance of the statutory context" in which the generic advertising programs existed. 521 U.S. at 469. Specifically, the Court explained that "[t]he business entities that [were] compelled to fund the generic advertising at issue in this litigation [did] so as a part of a broader collective enterprise in which their freedom to act [was] already constrained by the regulatory regime." *Ibid.* The *Wileman* majority emphasized that, as with *Abood* and its progeny, the compelled funding of generic advertising for California tree fruits was part of a broader regulatory program under which California tree fruit producers were compelled to associate with one another in order to "further the economic interests of the producers as a group." *Id.* at 475. Moreover, the *Wileman* majority repeatedly highlighted the comprehensiveness of the regulatory regime for California tree fruits, explaining that federal marketing orders had "displac[ed] unrestrained competition with Government supervised cooperative marketing programs," and "rest[ed] on an assumption that in the volatile markets for agricultural commodities the public w[ould] be best served by compelling cooperation among producers in making economic decisions that would be made independently in a free market." *Ibid.*; see also *id.* at 469 (California tree fruits were "marketed pursuant to detailed marketing orders that ha[d] displaced many aspects of inde-

pendent business activity that characterize other portions of the economy").[2]

It was thus in the context of a comprehensive regulatory regime that had "displac[ed] unrestrained competition" (521 U.S. at 475) that the *Wileman* majority concluded, under *Abood* and its progeny, that "generic advertising of [California tree fruits] is unquestionably germane to the purposes of the marketing orders." *Id.* at 473. As the majority explained: "Generic advertising is intended to stimulate consumer demand for an agricultural product ***in a regulated market***. That purpose is legitimate and consistent with the regulatory goals of the ***overall statutory scheme***." *Id.* at 476 (emphasis added). This makes sense because advertising is a part of marketing, and when marketing is performed on a collective and regulated basis, it follows that advertising must be collective as well.

However, when — as in the case of fresh mushrooms — competition in the market is performed on an individual and competitive basis, there is no regulatory scheme or purpose to which a generic advertising program can be deemed "germane." The Mushroom Act is a freestanding compelled speech program not "germane" to any other activity. Accordingly, the *Abood* analysis is inapplicable to this case. The Court instead should apply to the Mushroom Act the same level of scrutiny that it would apply to government efforts to compel respondent to promote a generic message of the government's choosing.

Amici wish to stress that collective speech programs are justified only in the context of particular kinds of regulation — regulation in which "competition" in marketing is displaced by

---

[2] Petitioner and some of its supporting *amici* argue that the marketing order in *Wileman* did not in fact involve as comprehensive a set of marketing restrictions as the Court's opinion presupposed. See Pet. Br. 12, 21, 27-28; Brief of *Amici Curiae* States of California *et al.* at 6. Needless to say, the constitutional rationale in *Wileman* must be understood in light of the Court's assumptions regarding the program, and cannot be changed after the fact by substitution of a different set of factual assumptions.

industry "cooperation" (*Wileman*, 521 U.S. at 475) — analogous to the worker solidarity achieved under collective bargaining. The point is not that a heavily regulated industry loses its free speech rights. See *Pacific Gas & Elec. Co.*, *supra*; *Turner Broad. Sys.*, *supra*.[3] Instead, when marketing is cooperative rather than competitive, it follows that the cooperative efforts must extend to the speech as well as the purely economic aspects of the business. Collective speech programs are not justified merely because the industry is heavily regulated, but because the regulation is of a particular sort: limitations on competition in the interest of the industry as a whole. Only then is collective speech germane to the regulatory program.

B. The Solicitor General's Argument Would Expand Collective Speech Programs Beyond The Rationale In *Wileman*

Ignoring the analytical framework for compelled funding of speech within which the *Wileman* decision fits, the government asks this Court to permit forced funding of speech even when it is not germane to any regulatory program at all. Specifically, the government argues that the portion of the holding "set forth in Part III of the *Wileman Brothers* opinion" should be disregarded, in favor of an analysis based solely on the three additional criteria set forth in Part IV. Pet. Br. 21-22. Under these criteria, the government may compel producers of agricultural products to pay for private speech against their will if the speech programs: (1) "impose no restraint on the freedom of any producer to communicate any message to an audience"; (2) "do not compel any person to engage in any actual or

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[3] Petitioner's argument that it "would make little sense to require Congress, in order to assure the constitutionality of a generic advertising program, * * * to tack on other regulations" (Pet. Br. 25-26) is thus beside the point. Compelled speech is not justified by "tacking on" miscellaneous regulations. Speech can be compelled only when the collective speech is an inherent part of a regulatory program that is otherwise constitutional — in the way that collective speech is an inherent part of collective bargaining.

symbolic speech"; and (3) "do not compel the producers to endorse or to finance any political or ideological views." *Id.* at 15 (quoting *Wileman*, 521 U.S. at 469-470); see also *id.* at 11, 17, 24-25. This interpretation of *Wileman* suffers from two fatal flaws.

First, it would confer upon Congress and state legislatures virtual carte blanche to compel individuals and businesses to contribute to collective speech efforts devised by dominant elements of groups of which they are a part — so long as the subjects are nonpolitical and nonideological. (The first two criteria are meaningless in the context of compelled contributions to collective speech programs, because they are always satisfied.) Thus, car dealers (even of foreign imports) could be compelled to contribute to advertisements proclaiming "Buy American." Lawyers (even defense lawyers, and lawyers with old-fashioned notions of professional propriety) could be compelled to pay for ads on park benches urging accident victims to sue. Manufacturers of low-cost generic drugs could lose the comparative advantage they gain through not advertising, by being forced to pay for ad campaigns designed by their better-known competitors. The ads could even warn against the supposed dangers of buying "Brand X." None of these hypothetical programs would be constitutional under Part III of *Wileman*, because they are not ancillary to any legitimate governmental regulatory program (and presumably could not satisfy heightened constitutional scrutiny), but all of them would be constitutional under the government's strained analysis.

Indeed, the government's proposed principle would extend even beyond the commercial context — to compelled funding of collective speech on any nonpolitical, nonideological subject. Residents in a neighborhood could be required to give money to a neighborhood association to produce a local newspaper (so long as it avoided political and ideological subjects). Members of an industry could be forced to contribute toward the commu-

nicative activities (other than political lobbying) of their trade association. Drivers along a highway could be forced to pay money to a private group to produce cheerful billboard displays. Doctors could be forced to pay for the dissemination of first aid pamphlets. Dentists could be required to pay for a publicity campaign for children to brush more and floss. Any number of communicative activities that presently are voluntary could become mandatory. The *Wileman* decision did not contemplate so sweeping a change in First Amendment doctrine.

Second, if, as the government posits, the constitutional analysis turns only on the three criteria in Part IV, the Court's discussion of the *Abood* test in *Wileman* (see 521 U.S. at 471-474) — and the government's discussion of that test here (see Pet. Br. 11, 15-17, 18, 30) — would be redundant. Under *Abood*, as characterized by the government, mandatory contributions to speech are constitutional if they are ***either*** germane to their legislative purpose ***or are non-ideological***. See *id.* at 16 & n.9. Because, however, one of the three "vital" factors that, according to the government, distinguishes compelled generic mushroom advertising from unconstitutional abridgements of speech is that generic advertising "do[es] not compel * * * producers to * * * finance any political or ***ideological*** views" (*Wileman*, 521 U.S. at 469-470 (emphasis added)), it would never be necessary to apply the *Abood* test to these programs. The fact that the *Wileman* majority did apply *Abood* to the generic advertising program at issue in that case is itself proof that more than the "three vital distinctions" must be satisfied for such a program to withstand constitutional scrutiny.

Abood is easily reconciled to *Wileman* — and the *Wileman* Court's discussion of *Abood* is made intelligible — if we understand Part III of the *Wileman* opinion as setting a threshold requirement for the constitutionality of collective speech programs, prior to consideration of the three criteria in Part IV. The threshold requirement is that the compelled speech be

ancillary to a ***non-speech-related regulatory program***. It is not sufficient, as the government argues (Pet. Br. 19), for the compelled speech merely to be germane to a "'legitimate' governmental purpose." That is no restriction at all.

C. Requiring Producers To Contribute To Generic Advertising Affects Their Free Speech Rights

As noted above, the government contends that the Mushroom Act warrants only rational basis review because "the generic advertising program for mushrooms is unlike laws that have been held to violate the freedom of speech protected by the First Amendment." Pet. Br. 11. That argument implicitly is grounded upon the contention that the forced funding of generic advertising has no impact upon the free speech rights of the producers and handlers who are forced to fund generic advertising. The *Wileman* majority did not go so far. Instead, as explained above, the *Wileman* majority held that the infringement of individual producers' rights in that case was justified solely in light of the comprehensive collectivist marketing framework of which compelled generic advertising was only a part. When, as here, the market is fully competitive and an "individual competitor's interest [is] in maximizing its own sales" through independent advertising (*Wileman*, 521 U.S. at 475), the harm wrought by generic advertising programs on the marketing strategies of producers and handlers of agricultural products is substantial.

The collective advertising programs constitute a preference for one message over another: the message that the generic similarities in products are of greatest importance, over the message that differences in products are of greatest importance. For obvious reasons, many members of the mushroom and other agricultural industries prefer to emphasize the generic message. Respondent and *amici* prefer to emphasize the differences. It offends fundamental First Amendment principles for the government to favor one message's content over

another — to favor the majority's generic message over the dissenters' individual message.

A recent decision of the California Supreme Court — in which it held that the California Plum Marketing Order implicated a plum grower's state-based right to freedom of speech — explained how these harms are inflicted. In *Gerawan Farming, Inc.* v. *Lyons*, 12 P.3d 720 (Cal. 2000), the court, per Justice Mosk, explained that history "has witnessed burdens imposed on [producers and handlers of agricultural commodities] as a result [of generic advertising]." *Id.* at 743. Specifically, the court explained that producers and handlers like *amici*, who "develop and use brands in marketing their goods," are "disadvantaged by generic advertising in their competition against" producers and handlers who do not market branded products, because "[g]eneric advertising may portray goods as indistinctive in spite of brand, and may thereby minimize consumer desire to distinguish *inter se*." *Ibid.* (internal quotation marks, citation, and brackets omitted). Conversely, "[g]eneric advertising can be manipulated to serve the interests of some producers [and handlers] rather than others, as by allowing some to develop a kind of brand by means of funds assessed from all and then use it for their own exclusive benefit." *Ibid.*

The assumption, therefore, that collective advertising benefits the entire industry, and that respondent and *amici* are mere free riders, is inaccurate. The collective advertising programs are content-based preferences for some speakers over others that force dissenters to pay for, and be associated with, speech with which they disagree.

II. COMPELLED GENERIC ADVERTISING CANNOT WITHSTAND CONSTITUTIONAL SCRUTINY STRICTER THAN RATIONAL BASIS REVIEW

Once it is recognized that mandatory generic advertising programs are subject to some form of heightened scrutiny, it

becomes evident that they cannot be sustained. Indeed, far from being necessary to an important public purpose, the programs primarily serve the private interests of dominant members of the affected industries.

A. The Programs Serve The Private Interests Of Dominant Members Of The Industry At The Expense Of The Dissenters

As the California Supreme Court observed in *Gerawan*, generic advertising and promotional programs provide opportunities for some program participants to "hijack[]" the funds supplied by others "as [the hijackers] drive to their own destination." 12 P.3d at 743. The examples that follow, drawn from three different generic advertising programs, illustrate the practical realities of these programs.

1. The Federal Almond Marketing Order

An example drawn from the California almond industry illustrates how a generic advertising program can become a vehicle for promoting the products of a dominant member of a commodity promotion board at the expense of its competitors. See *Cal-Almond, Inc.* v. *United States Dep't of Agric.*, 14 F.3d 429 (9th Cir. 1993). Under the federal Almond Marketing Order ("Almond Order") that regulated the California almond handling industry from 1950 onward, the California Almond Board administered a generic almond promotional campaign. See *id.* at 433.[4] From 1950 through the early 1990s, Blue Diamond — an agricultural cooperative — controlled the ten-member Board, holding a total of six seats in each year but three. See *In re: Saulsbury Orchards and Almond Processing, Inc.*, AMA Docket No. F&V 981-4 (Dep't Agric. Jan. 23, 1991), *reprinted in relevant part in* Appendix to the Petition for a Writ of Certiorari at 149a, 165a, *Cal-Almond, Inc.* v. *United*

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[4] The Almond Order in effect at the time of the *Cal-Almond* decision was codified at 7 C.F.R. Part 981, pursuant to the AMAA, 7 U.S.C. § 608c. See *Cal-Almond*, 14 F.3d at 433.

States Dep't of Agric. (No. 97-1935). Additionally, Blue Diamond, which sold under its own brand name, "overwhelmingly dominate[d] the retail market" for almonds, having a market share of 92%. *Cal-Almond*, 14 F.3d at 438 & n.9.

The money to pay for the Board's generic advertising program came from mandatory assessments collected from almond handlers. See *Cal-Almond*, 14 F.3d at 433. However, the Almond Order also authorized a handler to receive a credit against its assessment for amounts spent in purchasing its own advertising, up to the amount of the assessment used for generic advertising. See *ibid.* & nn. 1-2. In order to qualify for the credit, the advertising had to satisfy the extensive requirements of the creditable advertising regulations, and the Board alone (which was controlled by Blue Diamond) determined whether a handler's advertising satisfied those requirements. See *id.* at 433. Not accidentally, the regulations had the practical effect of allowing handlers to receive a credit for advertising almonds for retail sale to consumers but not for advertising almonds as ingredients. See 7 C.F.R. §§ 981.441(c)(3)(iv), (c)(5) (1992); see also *Cal-Almond*, 14 F.3d at 440. As a result, handlers of almonds sold as ingredients (such as for ice cream or breakfast cereal) were forced to pay the entire assessment but received no benefit, because the Board used the funds to promote ***retail*** almond sales. By contrast, Blue Diamond (which dominated the retail almond market) was able both to obtain full credit for advertising its own brand and to benefit a second time when the Board used the assessments paid by handlers of ingredient almonds to run "generic" advertisements promoting the retail sale of almonds for consumption.

This system prompted the Ninth Circuit, when it reviewed the constitutionality of the Almond Order, to conclude that "there seems to be no logical justification for these types of restrictions other than * * * to benefit Blue Diamond * * * at the expense of smaller handlers such as appellants, who sell

primarily to ingredient manufacturers." *Cal-Almond*, 14 F.3d at 440.

2. The California Milk Promotion Marketing Order

The experience of *amicus* Gallo Cattle Company under California's Milk Promotion Marketing Order ("Milk Order") exemplifies how generic advertising programs dilute the value of a company's hard-won reputation for premium quality, branded products.[5] Gallo is a milk producer-handler that manufacturers 100% of its liquid milk output into premium quality cheese, which it markets under the brand name "Joseph Farms." See Deborah K. Boyett, *The Effect of Glickman v. Wileman Brothers & Elliott, Inc. on Nongeneric Commodities: A Narrow Focus on a Broad Rule*, 9 SAN JOAQUIN AGRIC. L. REV. 95, 111-112 (1999). Pursuant to the Milk Order, Gallo is required to pay mandatory promotional assessments to the California Milk Producers Advisory Board ("CMAB") for use in generic advertising. See *id.* at 109-110; *Gallo Cattle Co.*, 185 F.3d at 970-971.

One of CMAB's generic promotional campaigns employs the "Real California Cheese®" seal (a federally registered certification mark) in conjunction with the slogan "It's the Cheese." See *Gallo Cattle Co.*, 185 F.3d at 971, 972 n.8; Boyett, *supra*, at 110-111. In order to qualify for any benefit from this campaign, such as through coupons and in-store sampling displays, a producer of branded or private label cheeses like Gallo is required to display either the seal or the slogan on its packages. Some large retailers, seeking to receive greater advertising revenue from CMAB, even refuse to carry cheese that does not display the marks. CMAB's generic

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[5] The Milk Order was promulgated pursuant to the California Marketing Act, California Food & Agriculture Code §§ 58601, *et seq.* See *Gallo Cattle Co.* v. *California Milk Advisory Bd.*, 185 F.3d 969, 970 (9th Cir. 1999).

advertising efforts thus create a Catch-22 for producers like Gallo.

On the one hand, in order to claim benefits under the "Real California Cheese®" program for which it has paid, Gallo must display marks that convey the erroneous message that its Joseph Farms cheeses are identical in quality to those of its competitors whose packages bear the identical seals. See Boyett, *supra*, at 114. In fact, Joseph Farms cheeses repeatedly have beaten the competition in taste tests. *Id.* at 112. Use of the marks also reduces the distinctiveness of Joseph Farms' own trade mark and trade dress. On the other hand, if Gallo does not place the seals on its packages, it not only is denied the economic benefits of participation, but it also faces the risk that consumers will conclude, again erroneously, that Joseph Farms cheeses are of lower quality than those bearing California's stamp of approval. See *id.* at 114. In either case, Gallo is forced both to pay for advertising that undercuts its competitive edge and to devote its depleted advertising budget to counteracting CMAB's misleading generic message.

3. The California Raisin Marketing Order

The "California Dancing Raisins" advertisements employed by the California Raisin Marketing Board during the 1980s and 1990s offer an example of how funds paid for generic advertising can be hijacked by one segment of an industry in order to create a type of brand for its exclusive benefit.

Sun-Maid Growers of California ("Sun-Maid") is an agricultural marketing cooperative that, as of 1996, was the largest single marketer of raisins in the world, processing and marketing raisins on behalf of 1,200 raisin farmers under the well-known "Sun-Maid" trademark. See Brief of *Amicus Curiae* Sun-Maid Growers of California in Support of Respondents at 1-2, 8, *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) (No. 95-1184) (hereinafter "Sun-Maid Br."). Although Sun-Maid was the largest single funder of the generic

advertising program for California raisins (see *id.* at 4), its competitors held a controlling position within the Board (see *id.* at 11 n.8). Consequently, the Board's generic promotional efforts tended to be constructed in ways that benefitted Sun-Maid's competitors.

For example, when the Board decided to use a purple box in its generic advertisements, a number of Sun-Maid's competitors began packaging their products in a purple box, effectively tying their products to the advertisements. See Sun-Maid Br. at 8-9. Sun-Maid could not mirror the advertisements, however, without destroying its own longtime trade dress, which included a red box. See *id.* at 9. Additionally, in the United Kingdom, Taiwan and Russia, the Board introduced raisin canisters carrying the image of the "Dancing Raisins" into direct competition with Sun-Maid's branded products. See *ibid.* & n.6. Thus, in effect, the generic program turned "California Raisins" into a competitive brand, a brand that Sun-Maid paid to create but could not use without harming its own long-established market identity.

B. Forced Advertising Programs Cannot Survive The Intermediate Level of Scrutiny Typically Applied to Restrictions on Commercial Speech

Because it is beyond serious dispute that forced funding of generic advertising directly impinges upon the free speech rights of producers and handlers of agricultural products, these programs must be subjected to the requisite constitutional scrutiny. Turning first to the three-part test usually applied to restrictions on commercial speech under *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), a compelled generic advertising program will be upheld only if: "the asserted governmental interest [behind the program] is substantial"; the program "directly advances [that] interest"; and the program "is not more extensive than is necessary to serve that interest." *Id.* at 566. The *Central Hudson* test "is not satisfied by mere speculation or conjecture."

Edenfield v. *Fane*, 507 U.S. 761, 770 (1993). Instead, the government must demonstrate that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 771. The government's arguments in this case illustrate the inadequacies that render the Mushroom Act and generic advertising programs like it unconstitutional.

1. The government has no substantial interest in requiring collective advertising

The government cites two interests that allegedly justify its intrusion into mushroom advertising and which, presumably, it also would consider sufficient to justify other generic advertising programs. First, it points to the Mushroom Act's stated goal of stimulating demand for fresh mushrooms, thereby maintaining and expanding existing markets. See, *e.g.*, Pet. Br. 2-3, 25. Second, it asserts that such mandatory programs avoid the "free rider" problem that purportedly would result if participation were voluntary, *i.e.*, non-participating industry members would receive benefits from advertisements for which they did not pay. See *id.* at 5, 12, 26, 30. Neither justification is constitutionally sufficient.

The government relies upon assertions in the Mushroom Act and the Federal Agricultural Improvement and Reform Act of 1996 that "the maintenance and expansion of existing markets and uses" for mushrooms are "vital to the welfare" of producers and marketers (Pet. Br. 2-3 (quoting 7 U.S.C. § 6101(a)(5)), and that compelled funding of generic advertising leverages the advertising opportunities that otherwise might be unavailable to "individual producers and processors" (*id.* at 7 (quoting 7 U.S.C. § 7401(b)(7)) and "small producers" (*ibid.* (quoting 7 U.S.C. § 7401(b)(10)). Not only are such unsupported assertions a far cry from the requisite showing that "the economic health of [the industry] is in genuine jeopardy and in need of the protections" afforded by the mandatory advertising program (*Turner Broad.*, 512 U.S. at 664-665), but they also are so general as to be constitutionally meaningless.

Presumably, Congress has an interest in "the maintenance and expansion of existing markets and uses" for the products of every industry that contributes to the economic health of the nation. 7 U.S.C. § 6101(a)(5). If the mere recitation of this generic interest were a sufficient basis for restricting speech, there would be virtually nothing left of constitutional protections for commercial speech. The same would be true if the government's interest in merely raising the incomes of a favored subclass of producers and handlers were constitutionally adequate. If nothing more were required, the "must-carry" provisions in *Turner Broadcasting* and the ban on pharmacy price advertising in *Virginia State Board of Pharmacy* could have been summarily upheld. Although promoting favored industries or segments of an industry are undoubtedly sufficient grounds to sustain mere economic regulation (see *Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483 (1955)), they are not sufficient to coerce or to restrict constitutionally protected speech.

The selective character of the generic advertising programs for fresh mushrooms and other agricultural products demonstrates that any claim that the programs are "necessary" for market stability or other legitimate public purposes is untenable. Why are mushrooms subject to mandatory collective advertising and not oranges, lemons, or spinach? The government points to no explanation in the legislative or administrative record that offers even a clue as to why some products are covered but not others. This suggests that the real reason speech is controlled in some markets and not others is that politically powerful actors want speech control in some markets and not in others. A hunt for genuinely public purposes — let alone "important" or "compelling" public purposes — will be left empty-handed.[6]

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[6] If, as some commentators believe, the total amount of food consumed remains stable, then advertisements for one product actually will have a "cannibalistic impact," with any increase in demand for the advertised

As for the government's contention that forced funding of generic advertising is permissible under a "free rider" theory, that argument not only lacks factual support, it manifests a fundamental misunderstanding of the "free rider" principle and, if accepted, would give the government nearly unlimited power to compel funding of speech. As Justice Scalia recognized in *Lehnert*, "private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for." 500 U.S. at 556 (Scalia, J., concurring in part and dissenting in part). An advertisement for a Ford SUV may well stimulate demand for a Chevrolet SUV; advertisements explaining the health benefits of branded aspirin may build demand for generic aspirin; the efforts of a trade association will often benefit non-members as well as members; the advertising of one candidate from a political party will often increase support for others of that party. "Free riding" in this context is simply another word for positive externalities, which are a natural part of the marketplace of ideas. If externalities were a legitimate basis for government intervention, politically powerful interest groups would waste no time in seeking laws to force "free riders" to contribute toward the communication of their messages. As the California Supreme Court observed in *Gerawan*, "in any given case, a producer who objects to generic advertising may not be attempting to ride free on the funds of others — a familiar charge — but may merely be

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product offset by decreased demand for another product for which it is a substitute. See Lee, Brown & Fairchild, *Some Observations on the Impact of Advertising on Demand*, 5 AGRIBUS. 607, 613 (Nov. 1989). The government's interest does not appear to be furthered when advertising increases returns for growers of one product, but decreases the return for growers of another product. *Ibid.*; see also Piggott, *Returns To Incremental Advertising Expenditure in the Presence of Cross-Commodity Impacts and Inseparable Markets: An Equilibrium Displacement Modeling Approach* 19-21 (1995) (noting similar problem where "advertising for a product in one market (for example, the domestic market) might increase domestic sales at the expense of sales to another market (the export market) with little or no price effect").

making an effort to prevent others from hijacking his own funds as they drive to their own destination." 12 P.3d at 743.

2. The government has not shown that mandatory generic advertising materially advances its purported interest

To satisfy the second prong of *Central Hudson*, the government must show that the mandatory forced advertising program will advance its interests "'to a material degree.'" *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 505 (1996) (quoting *Edenfield*, 507 U.S. at 771). Turning first to the government's asserted interest in avoiding free-ridership, the government's reasoning is circular; if there were no generic advertising programs there could be no "free riders."[7] As for the government's interest in maintaining and expanding the markets for agricultural products, logic and history indicate that

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[7] The government's "free rider" justification for generic advertising programs also is disingenuous, given that most such federal programs statutorily create free ridership. For example, under the Mushroom Act, fresh mushroom producers and importers of less than 500,000 pounds per year and all mushrooms for processing are exempt from the assessment requirement. 7 U.S.C. §§ 6102(6), (9), (11), 6104(g)(1)(A)-(B). See also, *e.g.*, Egg Research and Consumer Information Act, 7 U.S.C. § 2711(a)(1) (exempting producers with fewer than 75,000 laying hens); Lime Research, Promotion, and Consumer Information Act, 7 U.S.C. § 6204(d)(5) (exempting producers, handlers and importers of less than 200,000 pounds per year); Fluid Milk Promotion Act, 7 U.S.C. §§ 6402(4), 6409(a) (exempting processors of less than 500,000 pounds of milk in consumer-type packages per month); Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act, 7 U.S.C. §§ 6802(4)(B), 6804(h)(1)(C)(i) (exempting handlers with less than $750,000 in annual gross sales); Sheep Promotion, Research, and Information Act, 7 U.S.C. § 7104(i)(5)(A) (exempting importers of raw wool); National Kiwifruit Research, Promotion, and Consumer Information Act, 7 U.S.C. § 7465(b)(5)(A)-(B) (exempting producers of less than 500 pounds and importers of less than 10,000 pounds per year); Popcorn Promotion, Research, and Consumer Information Act, 7 U.S.C. §§ 7482(11), 7484(f)(1) (exempting processors of less than 4 million pounds per year).

generic advertising programs are at best ineffective and, at worst, vehicles for corruption and self-dealing.

a. Generic advertising is harmful to consumers

By forcing producers and handlers of agricultural products to fund a program of generic advertising, the government distorts the marketplace of commercial ideas to the detriment of consumers. A program that skews advertising in favor of more generic messages necessarily decreases the relative share of advertising that focuses on differences between products in the advertised category. Often, however, this is the most useful information from the consumer's point of view. See *Virginia State Bd. of Pharmacy*, 425 U.S. at 763. The government distorts the marketplace of commercial ideas to the detriment of consumers by depriving consumers of this useful information, which would be provided in greater abundance in the absence of this program.

Moreover, by making it more costly and difficult for producers to publicize quality differences, mandatory generic advertising greatly reduces producers' incentives to make the investments necessary to produce superior or distinctive products. If, for example, a government-mandated advertising program is designed to create the impression that all fresh mushrooms are essentially the same, it will be hard to make a profit by investing in a better product. Unlike a collectivized industry — such as that for California tree fruits addressed by this Court in *Wileman* — which necessarily suppresses product differences in the interest of stabilizing the industry as a whole, a fully competitive market such as that for fresh mushrooms is built upon the development and promotion of product differences. It was with this concept in mind that this Court explained in *Virginia State Board of Pharmacy* that "[s]o long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be

intelligent and well informed. To this end, the free flow of commercial information is indispensable." 425 U.S. at 765. Compelled funding of generic advertising programs undermines this fundamental principle. Accordingly, without evidentiary support, which the government does not provide, there is no basis to conclude that generic advertising advances the government's interest in stimulating demand "in a direct and material way." *Edenfield*, 507 U.S. at 767.

b. Generic advertising programs create opportunities for corruption and self-dealing

Within the past three years alone, reports of mismanagement and misuse of funds have prompted the United States Department of Agriculture ("USDA") to commence reviews of a number of the commodity-specific generic promotion programs established by Congress, all of which are funded by mandatory assessments collected from producers, handlers, and/or importers of the commodities. See, *e.g.*, Sharon Walsh, *USDA to Review Promotion Programs; Spending on Cotton Comes Under Fire*, WASH. POST, Dec. 3, 1998, at E1. We submit that this is the predictable result of replacing the competitive, profit-oriented market with a collective, governmental effort in which politically favored board members spend their competitors' money, and producers are forced to participate whether or not their contributions are well spent.

i. The National Fluid Milk Processor Promotion Program

In a 1998 audit of the National Fluid Milk Processor Promotion Program ("Milk Program") authorized by the Fluid Milk Promotion Act, codified as amended at 7 U.S.C. §§ 6401, *et seq.*, USDA's Inspector General ("IG") uncovered "serious problems with the National Fluid Milk Processor Promotion Board's ("Board") management structure and with the manner in which expenditures were made." OFFICE OF INSPECTOR

GENERAL, U.S. DEP'T OF AGRIC., AUDIT REPORT NO. 01001-3-Ch, NATIONAL FLUID MILK PROCESSOR PROMOTION PROGRAM, iv (Sept. 1998) (hereinafter "MILK AUDIT"). The IG's concerns were of sufficient magnitude to prompt him to recommend that USDA's Agricultural Marketing Service ("AMS"), which has oversight responsibility for the Milk Program (see *id.* at 1, 9), suspend the Board's operations pending restructuring, a recommendation that the AMS rejected. See *id.* at vi, 18-19.

The audit report revealed that the Milk Board relied almost exclusively on certain private contractors, namely the Milk Industry Foundation and its parent organization, the International Dairy Food Association, to conduct its generic promotion and research activities (MILK AUDIT at 2), with virtually no oversight by the Board or AMS (see *id.* at iv, 5, 9). As a result, the IG concluded, the Board had allowed payment of over $127 million — 75% of the total mandatory assessments collected by the Board — without the requisite AMS approval. *Id.* at 9, 14-15, 21.

In addition, the IG criticized the Board's entry into sole-source contracts without first requiring any competitive bidding to ensure that the contract awarded was the most cost-effective. MILK AUDIT at iv, 34. Most notably, the IG found that the "subcontract for the Board's advertising and public relations activities with a major advertising agency was let without competition." *Id.* at 34. This resulted in a windfall to the advertising agency, which received a total of $123 million from the Board — 93% of the Board's total expenses as of the date of the audit. See *ibid.* This state of affairs led the IG to conclude that "the Board may have overpaid for services and may not be obtaining the objective, professional opinions and services it expects to receive." *Ibid.* The IG also found that this advertising agency acted improperly when it awarded a subcontract to its wholly-owned subsidiary, to which it had provided inside information — ***after*** the closing of the

competitive bid period — that enabled the subsidiary to outbid its competitors. See *id.* at 36-37.

As if the wasteful expenditures and mismanagement documented by the IG's audit report were not troubling enough, it also found that not a single study had been conducted to determine whether the millions of dollars in expenditures on compelled generic promotional efforts had increased milk consumption. See MILK AUDIT at 3, 9, 16-18. In fact, the Board's Administrator bluntly informed the IG that he "did not believe anyone was interested in knowing whether the Board's activities influenced milk consumption." *Id.* at iv; see also *id.* at 16.

ii. The Federal Cotton Promotion Program

A report published in the Washington Post in late 1998 revealed similar problems in the administration of the Cotton Research and Promotion Act of 1966, codified as amended at 7 U.S.C. §§ 2101, *et seq.*, which established the Cotton Board to implement, *inter alia*, generic campaigns promoting cotton and cotton products using funds collected from cotton producers and importers. See Sharon Walsh, *Spending Hidden by a Cotton Curtain; Farmers' "Promotional" Fees Used for Golf, Topless Dancing, Alcohol*, WASH. POST, Nov. 25, 1998, at A1 (hereinafter *"Cotton Curtain"*). The Cotton Board turned over assessment funds to Cotton Inc., a private, nonprofit organization that, since its inception in 1970, had an exclusive contract with the Cotton Board to plan and execute promotional projects for cotton. See Agricultural Mktg. Serv., U.S. Dep't of Agric., *Cotton Research and Promotion Program, available at* http://www.ams.usda.gov/cotton/ctnR&P.htm. (last visited on March 6, 2001); Walsh, *Cotton Curtain, supra.*

Although the federally-appointed Cotton Board ostensibly oversaw the operations of Cotton Inc., former members of the Board explained that their oversight role "was a joke," because in practice "Cotton Inc. call[ed] the shots." Walsh, *Cotton*

Curtain, *supra*. Another former member of the Cotton Board explained that "'Cotton Inc. has the real power. They decide, their board votes. Then they present it to the Cotton Board as a fait accompli.'" *Ibid.* In fact, these insiders revealed that "Cotton Inc. officials often referred to Cotton Inc. as 'the company' and the Cotton Board as 'the cash register.'" *Ibid.* Moreover, because no other entity had ever been invited to bid for the Cotton Board's business, Cotton Inc. remained entrenched for more than thirty years as "the sole beneficiary" of the mandatory assessments collected from cotton producers and importers. *Ibid.* This relationship effectively gave Cotton Inc., which was not subject to USDA oversight, complete discretion over the expenditure of Cotton Board funds, which totaled approximately $60 million in 1998. See *ibid.*

A 1996 report of USDA's IG found that "the absence of competition . . . invite[s] inefficient and wasteful use of producer and importer funds." Walsh, *Cotton Curtain*, *supra* (alteration in original). As a recent example, one former chief executive of Cotton Inc. received a salary of $269,000 dollars in 1996 and then, after leaving his post at Cotton Inc., was awarded a $215,000 consulting contract. *Ibid.* Another controversial expenditure was the annual black tie gala at New York's Metropolitan Museum of Art hosted by Cotton Inc. for cotton ginners, textile mill owners, spinners, weavers and retailers which, as of 1997, cost in excess of $450,000. *Ibid.* The USDA IG's 1996 audit report noted that his office "question[ed] whether this annual [] event effectively promotes cotton." *Ibid.*

Less expensive, but no less shocking, was the expenditure by the Cotton Board's second highest-ranking official of $8,500 of producer and importer fees at topless bars and other adult entertainment venues — including $2,915 for what bills characterized as "personal services" — over 18 months from 1994 to 1996. See Walsh, *Cotton Curtain*, *supra*. Such lavish expenditures on "entertainment" were not uncommon. For

example, in 1992, the Cotton Board expended more than $14,000 for alcohol consumed by Board members, staff and guests at open bars during two functions sponsored by the Board. *Ibid.* Another $6,000 was spent on alcohol at a 1994 dinner attended by Board members, their spouses and guests. *Ibid.* Many of these expenses were not clearly disclosed in company books. *Ibid.*

The impropriety of this spending is underscored by the results of an evaluation of the cotton program conducted in 1996 by Texas A&M University. That study concluded that whatever benefits have accrued to the cotton industry as a result of the generic promotional efforts have flowed to textile mills, and not to the producers and importers who supply the advertising funds. See Walsh, *Cotton Curtain*, *supra*. In other words, the compelled assessments collected from cotton producers and importers provided a steady source of money to support the whims of the Cotton Board and Cotton Inc., but they provided no measurable benefit to those whom the cotton program was enacted to help — the producers and importers who were funding it.

iii. The Federal Pork Promotion Program

In March of 1999, USDA's IG issued an audit report regarding the National Pork Board's control over pork checkoff funds, which are the mandatory assessments collected from all pork producers to fund generic advertising pursuant to the Pork Promotion, Research and Consumer Information Act of 1985, codified at 7 U.S.C. §§ 4801, *et seq.* See OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF AGRIC., EVALUATION REPORT NO. 01801-1-KC, AGRICULTURAL MARKETING SERVICE CONTROLS OVER PORK CHECKOFF FUNDS, 1 (March 1999) (hereinafter "PORK AUDIT"). Like the federal milk and cotton programs, the Pork Board relied on a single contractor, the National Pork Producers Council ("NPPC"), to plan and implement the generic pork promotional campaigns. See *ibid.*

Although the IG's audit did not discover any material misuse or loss of checkoff funds, he did conclude that, because neither the Pork Board nor the AMS conducted or required compliance reviews, "an average of about $10.5 million checkoff funds distributed to State associations each year ($31.6 million from 1995 through 1997) are vulnerable to waste, loss, and misuse." PORK AUDIT at 20. The IG also concluded that the Pork Board "ha[d] relinquished too much authority to" NPPC and "ha[d] placed the NPPC in a position to exert undue influence over Board budgets and grant proposals," thus "weaken[ing] [the Board's] accountability over contributed funds." *Id.* at i; see also *id.* at 8.

According to the IG, the lack of accountability to pork producers was exacerbated by the Pork Board's failure to establish inclusive voting procedures for Board delegates and its failure to monitor state elections practices. See PORK AUDIT at 24. In a review of elections conducted in five states, the IG found that fewer than one percent of eligible pork producers voted in four of the states and that fewer than three percent voted in the fifth. *Id.* at 24-25. The IG attributed these low turnouts to the limits imposed by the state pork producer associations on the number and location of voting sites available to producers and to their refusal to permit mail-in balloting. See *id.* at 24.

3. Mandatory advertising programs are not narrowly tailored to achieve the government's asserted interests

The third prong of the *Central Hudson* test requires that compulsory funding of generic advertising be "no more extensive than necessary to further" the government's interest. 447 U.S. at 569-570. In *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993), this Court indicated that a restriction on commercial speech would not be deemed to satisfy this element of *Central Hudson* if there are "obvious less-burdensome alternatives to the restriction on commercial

speech." *Id.* at 417 n.13; see also *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 490-491 (1995). Because a host of alternative methods, each of which is less intrusive to free speech rights than forced funding of generic advertising, could achieve the government's asserted interests, the mushroom advertising program fails the third prong of the *Central Hudson* test.

If the mushroom industry or any other agricultural industry needs economic assistance, the government could provide financial subsidies or tax incentives directly to growers and handlers. If advertising is necessary, the most obvious less restrictive alternative has already been enacted: laws facilitating agricultural cooperatives.[8] Agricultural cooperatives have created and marketed some of the most recognized and successful brand names in the world — Sun Maid Raisins, Ocean Spray Cranberries, Land-O-Lakes Butter, and Sunkist Oranges. A legislature also could implement a ***voluntary*** collective advertising program that provides financial or other incentives to those who participate. Or, the government could advertise directly, and spread the cost among all taxpayers rather than only among producers and handlers. And, of course, producers and handlers who wish to take advantage of joint collective advertising could create their own trade associations without any government involvement at all. All of these options would burden speech substantially less.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

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[8] Both federal and state laws recognize the effectiveness of agricultural cooperatives and encourage their formation. See, *e.g.*, 7 U.S.C. § 610(b)(1); 12 U.S.C. § 1141a(3); 7 U.S.C. § 291; Cal. Food & Agric. Code §§ 54038-54039, 54031(a).

Respectfully submitted.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA AND UNITED STATES DEPARTMENT OF AGRICULTURE,
Petitioners,

v.

UNITED FOODS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the assessments imposed pursuant to the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101, *et seq.*, on members of the mushroom industry for advertising programs designed to support the industry violate the First Amendment.

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INTEREST OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters across the Nation. WLF regularly appears in legal proceedings before federal and State courts in cases raising important issues under the First Amendment Free Speech Clause. *See, e.g., Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997); *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996); *Keller* v. *State Bar,* 496 U.S. 1 (1990). WLF submits this brief in support of Respondent and with the consent of all parties. Letters of consent have been filed with the Clerk of the Court.[1]

SUMMARY OF ARGUMENT

Respondent United Foods, Inc. (United) accuses the United States, in effect, of being a bully in the marketplace of ideas. The United States replies that *Wileman* means that "the compelled funding of expressive activities does not violate the First Amendment so long as . . . the expressive activities are *either* non-ideological *or* germane to the statutory or regulatory purpose . . . ." Br. Pet. 16 n.9. Interpreted so broadly, *Wileman* directly conflicts with the Court's consistent understanding of compelled speech. If the Court wishes to harmonize *Wileman* with its compelled speech cases, that decision must be give its narrowest possible holding. Such a reading would limit *Wileman* to upholding the compelled funding of expressive activities only when the funding scheme arises in a pervasively regulated context fairly indistinguishable from what the Court identified in *Wileman* itself.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Washington Legal Foundation, its supporters, and its counsel, made a monetary contribution to the preparation and submission of this brief.

If the Court wishes to reconsider *Wileman*, however, it should adopt strict scrutiny as the constitutional standard for assessing compelled subsidy claims. Government programs compelling private financial support for expressive activities *always* raise constitutional issues, regardless of the subject matter of the expression. It is the essential fact of compulsion, not the accident of subject matter, that makes compelled speech a matter of core First Amendment concern. Given its proximity to core First Amendment principles, a governmentally mandated subsidy should be struck down unless it serves a compelling government interest and is narrowly tailored to avoid unnecessary infringements on free speech.

The Mushroom Act and Order fail the strict scrutiny test. Promoting the consumption of mushrooms does not qualify as a *compelling* government interest. Even if it did, forcing growers to financially support speech with which they disagree is not a narrowly tailored means to that end.

ARGUMENT

I. THE GOVERNMENT'S READING OF *WILEMAN* UNNECESSARILY CONFLICTS WITH THE COURT'S COMPELLED SUBSIDY CASES.

The United States contends that *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997) stands for the following rule: "the compelled funding of expressive activities does not violate the First Amendment so long as . . . the expressive activities are *either* non-ideological *or* germane to the statutory or regulatory purpose . . . ." Br. Pet. 16 n.9. This reading of *Wileman* must be rejected. For if adopted,

Wileman will conflict with this Court's decisions sharply constraining the government's power to compel speech or the funding of speech.

The First Amendment declares, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. "'Since *all* speech inherently involves choices of what to say and what to leave unsaid,' . . . one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley* v. *Irish-American Gay Group*, 515 U.S. 557, 573 (1995) (quoting *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n*, 475 U.S. 1, 11, 16 (1986) (plurality opinion); *see also West Virginia Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 642 (1943) (striking down a Pennsylvania law requiring school children to recite the Pledge of Allegiance regardless of their religious objections); *Wooley* v. *Maynard,* 430 U.S. 705, 713–15 (1977) (invalidating a New Hampshire law imposing criminal penalties on motorists who fail to display the state motto, "Live Free or Die," on automobile license plates). Indeed, the Court has emphasized that the difference between compelled speech and compelled silence "is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley* v. *National Federation of the Blind,* 487 U.S. 781, 796–97 (1988).

The same principles govern claims challenging the validity of government programs that mandate private financial support for officially approved or authorized expressive activity. *Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1977) and *Keller* v. *State Bar of*

California, 496 U.S. 1 (1990) are the leading cases on this point.

Abood arose from an "agency shop" arrangement between a public school board and a teachers' union. Teachers who declined to join the union were nonetheless required to pay the union an "agency fee" equal to the dues paid by union members. 431 U.S. at 211. The government justified forcing nonmembers to pay by pointing to its interest in maintaining "labor peace," *id.* at 224, which Congress had determined was directly advanced by a system of exclusive collective bargaining. *See id.* at 220–24.

Under that system a union designated as an exclusive bargaining agent is required to represent all employees within the bargaining unit (including nonmember employees). *Id.* at 221. The Court perceived a free rider problem, however. Nonmembers have a financial incentive "to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees" unless nonmembers could be required to pay for such benefits. *Id.* at 222. Because of the government's interest in preserving "labor peace," *id.* at 224, and the free rider problem that augmented that interest, the Court upheld the imposition of mandatory union fees on nonmembers. *Id.* at 225.

But the Court went on to draw a key distinction between activities "germane" to the government's interest in preserving peaceful labor relations and activities that are not.[2] The Court acknowledged that

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[2] Although courts have occasionally had difficulty in drawing this line with precision, *see Board of Regents* v. *Southworth*, (continued...)

the First Amendment poses no obstacle *per se* to the expenditure of union monies "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative." *Id.* at 235 (footnote omitted). Using *mandatory* union fees for such purposes is off-limits. A union may constitutionally devote resources to activities not germane to the purpose of maintaining the system of exclusive collective bargaining, the Court said, *only if* "financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 236.

Animating this distinction, the Court said, was the threat posed by compelled subsidies to core First Amendment concerns:

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his

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[2] (...continued)
529 U.S. 217, 231–32 (2000), reported decisions have repeatedly emphasized that the *only* government interest that justifies impingement on the First Amendment rights of nonunion employees is the interest in maintaining a system of exclusive bargaining. *See, e.g., Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 506, 520–21 (1991).

> mind and his conscience rather than coerced by the State.

Id. at 234–35.[3]

Keller v. *State Bar of California,* 496 U.S. 1 (1990) applied *Abood*'s constitutional analysis in the context of mandatory dues paid to an integrated State bar association. There the Court found that such compelling the payment of bar dues infringes lawyers' First Amendment rights unless used to "fund activities germane to . . . regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* at 14 (quoting *Lathrop* v. *Donohue,* 367 U.S. 820 (1960)).

Similar to its reasoning *Abood* the Court agreed with the government that "the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13–14. Once again, the Court identified a "free rider" problem that augmented this limited justification for compelling the subsidization of bar-related activities. "It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort." *Id.* at 12.

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[3] The Court has never suggested that a different constitutional analysis obtains depending on whether the compulsion takes the form of government efforts to force individuals to utter specific words (as in *Barnette*) or the form of monetary exactions to finance speech by non-government entities (as in *Keller* and *Abood*).

Yet the Court hastened to add that the First Amendment prohibited the bar association from using such compelled funding for "activities of an ideological nature." *Id.* at 14. Among such forbidden uses for officially compelled funds included "endorse[ment] or advance[ment] [of] a gun control or nuclear weapons freeze initiative," *id.* at 16, activities in which the State Bar of California had already engaged. *Id.* at 15.

Abood, *Keller*, and their progeny thus establish that mandatory government subsidies imposed to fund expressive activity must satisfy exacting First Amendment scrutiny. First, the government must demonstrate that the compulsory financial support serves some heightened government interest. *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 506, 519 (1991) (plurality). Second, the funded activity must be "germane" to the government interest asserted as compelling. *Id.*; *see Keller*, 496 U.S. at 13 ("*Abood* held that a union could not expend a dissenting individual's dues for ideological activities not 'germane' to the purpose for which the compelled association was justified: collective bargaining."). Third, the compulsory funding scheme must be narrowly tailored to serve that compelling interest. *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 303 & n.11 (1986); *Pacific Gas & Electric Co.* v. *Public Util. Comm'n*, 475 U.S. 1, 19 (1986) (plurality). This means the mandatory subsidy at issue must not "significantly add to the burdening of free speech that is inherent in the allowance" of any amount of compulsory funding of expressive activity. *Lehnert*, 500 U.S. at 519 (plurality).

These well-settled principles contradict the government's reading of *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997). In that case a group

of California fruit growers challenged regulations issued by the Secretary of Agriculture, which required them to pay for a series of generic advertisements extolling the virtues of peaches, plums, and nectarines. *Id.* at 460–61. The growers argued that the assessments unconstitutionally required them to engage in objectionable speech. However, the Court held in a narrowly divided decision that the regulations at issue there did *not* violate the First Amendment. It reached this conclusion only because the growers "agree[d] with the central message of the speech," and therefore the regulations did not require the growers to "repeat an objectionable message out of their own mouths" or otherwise "compel any person to engage in any actual or symbolic speech." *Id.* at 469–70.

The United States interprets *Wileman* to mean that "compelled funding of expressive activities does not violate the First Amendment so long as . . . the expressive activities are *either* non-ideological *or* germane to the statutory or regulatory purpose." Br. Pet. 16 n.9. If true, *Wileman* stands in direct opposition to *Abood* and *Keller*.

First, the constitutional principles enunciated and applied in *Abood* and *Keller* extend to the compelled funding of *any* speech or expressive activity, not simply to "nonideological" speech. As the Court has observed, "our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protections." *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977); *see also Lehnert*, 500 U.S. at 521-522 (plurality) ("First Amendment protection is in no way

limited to controversial topics or emotionally charged issues.").

The capaciousness of *Abood* and *Keller* is a natural outgrowth of their roots in more general compelled speech doctrine. *Wooley* v. *Maynard,* 430 U.S. 705 (1977), for instance, stressed that the First Amendment protects "the right to refrain from speaking *at all*," not only the right to refrain from speaking on political or controversial subjects. *Id.* at 714 (emphasis added). The government's assertion that compelled speech deserves no First Amendment protection merely because the speech is nonideological runs contrary to the Court's decisions.

Second, the government's portrayal of *Wileman* is also out of harmony with *Abood*, *Keller*, and other compelled subsidy cases, because it attempts to dilute the "narrow tailoring" requirement central to this Court's established understanding of the First Amendment. The United States contends that compelled financial support of the expressive activities of private parties should be upheld so long as it is "germane to the statutory or regulatory purpose." Br. Pet. 16 n.9. Framed in such loose terms, the government's standard amounts to little more than rational basis review of compelled speech. Not only does this contradict *Abood*. *See Keller*, 496 U.S. at 13. It runs contrary to this Court's decisions, which leave no doubt that the First Amendment prohibits the government from treating one's right not to speak (or subsidize speech) so cavalierly. *See, e.g.*, *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 303 (1986).

Consider how the Court's First Amendment landmarks would look under the government's view

of compelled speech. Schoolchildren could be dragooned into reciting the Pledge of Allegiance despite their most heartfelt religious objections. *But see West Virginia Bd. of Education* v. *Barnette,* 319 U.S. 624, 642 (1943). Inculcating a spirit of national unity would appear, even in ordinary times, to qualify as an "important regulatory objective," and compelled recitation of the Pledge of Allegiance is undoubtedly "germane" to that objective. Yet even at the height of World War II, the Court stoutly rejected the notion that fostering national unity ought to override First Amendment concerns. *Id.* at 640–41. It therefore strains credulity to assert, as the government does, that a merely rational basis review—the same standard used to review the economic regulation of opticians, *Williamson* v. *Lee Optical*, 348 U.S. 483 (1955)—adequately protects the core First Amendment concerns implicated when the government marshals its power to coerce the financial support of speech.

All this leaves the Court in something of a quandary. If read according to its broadest language, as the government suggests, *Wileman* will stand in direct conflict with a long line of firmly established compelled speech and compelled subsidy cases. The Court can avoid this conflict by reading *Wileman* according to its narrowest ground of decision instead. That saving interpretation is the one advocated by United Foods, namely that *Wileman* turns on "the comprehensive nature of regulations governing the tree fruit industry and marketplace." Br. Opp. 9. If the Court wishes to reexamine *Wileman*, as the Institute for Justice suggests, *see* Br. Amicus Curiae Institute for Justice, then it will be helpful to review the Court's compelled speech decisions and ask what the First

Amendment demands in compelled subsidy cases, and why. The answer, we think, is simple and compelling: the First Amendment prohibits the government from imposing a mandatory subsidy, unless it passes the test of strict scrutiny.

II. OFFICIALLY COMPELLED SUBSIDIES OF EXPRESSIVE ACTIVITY MUST PASS THE TEST OF STRICT SCRUTINY.

An analysis of why compelled speech and its cousin, the compelled subsidy, merit First Amendment protection properly begins with the contrary position, set out by the United States and its *amici*. They make the sweeping argument that the First Amendment does not reach a government program compelling the financial support of generic advertising. The government would uphold any government-ordered subsidy, even of admittedly expressive activities, "so long as . . . the expressive activities are *either* non-ideological *or* germane to the statutory or regulatory purpose . . . ." Br. Pet. 16 n.9. Amici Curiae American Mushroom Institute, *et al.* (Mushroom Institute) would go further. They assert that "compelled funding of speech raises *no First Amendment issue* unless the speech is political or ideological." Br. *Amici Curiae* American Mushroom Inst. 9 (emphasis added). We respectfully disagree.

Whether "the speech funded by the Mushroom Act is . . . after all, about mushrooms," *id.* at 6, is entirely beside the point. This Court has specifically rejected a subject matter test for evaluating compelled subsidy claims under the First Amendment. "Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical

constitutional inquiry." *Abood*, 431 U.S. at 232. Indeed, the Court has "never suggested that expression about philosophical, social, artistic, *economic*, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to *full* First Amendment protections." *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 231 (1977) (emphasis added). Speech about mushrooms is as entitled to constitutional protection as speech about tax reform, the ethics of redistribution, or the novels of P.G. Wodehouse.

Perhaps the government's real objection to United Foods' claim lies not so much with the speech at issue being nonideological, but rather with its being *commercial*. Maybe the government's position rests at bottom on the assumption that commercial speech is "a sort of second-class expression." *R.A.V.* v. *St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring). If this is a fair reading of the government's argument, two answers suggest themselves.

First, one might glibly point out that "commercial speech" is a term of art under the First Amendment. It does not mean "whatever can be expressed in economic terms." Instead the Court has limited its meaning to speech that "propose[s] a commercial transaction." *Board of Trustees* v. *Fox*, 492 U.S. 469, 473 (1989). Fully protected speech—according to *Abood*, this includes speech on economic matters—is not transformed into commercial speech just because it is uttered by a corporation, *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765 (1978), or because the speaker is motivated by a desire for a profit. "Some of our most valued forms of fully protected speech are uttered for a profit." *Fox*, 492 U.S. at 482. In its leading postwar free speech case, for example, the Court

afforded full First Amendment protection to the contents of a paid advertisement soliciting money. *See New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964).

Second, a government order *compelling* speech or the financial support of speech is quite unlike a government order *regulating* speech. The distinction is amply supported by the Court's decisions and is relevant, if not controlling, in deciding the question presented. To see that distinction in sharper relief, it will be helpful to briefly review this Court's commercial speech jurisprudence.

It lies beyond dispute that the First Amendment safeguards the public's interest in "the free flow of commercial information." *Virginia State Bd. of Pharm.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). While emphasizing that a government ban on advertisements may violate the First Amendment, *id.* 773, at the Court added that the Constitution "does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." *Id.* at 772. Regulations may validly require that commercial advertisements "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent [their] being deceptive." *Id.* at 772 n.24. In a later case the Court explained that, to merit constitutional protection, commercial speech "must concern lawful activity and not be misleading." *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

To eliminate potential deception, the government may impose mandatory disclaimer requirements on

commercial advertising. *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985) sustained an Ohio rule requiring lawyers whose advertisements are potentially misleading to include warnings or disclaimers in the advertisements in order to "dissipate the possibility of consumer confusion or deception." *Id.* at 651. However, the Court has firmly distinguished between a mandatory disclaimer and compelled speech. "Nothing in *Zauderer* suggests, however, that the State is equally free to require corporations to carry the messages of third parties, where the messages themselves are biased against or expressly contrary to the corporation's views." *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n*, 475 U.S. 1, 15 n.12 (1986) (plurality opinion).

Based on these principles the Court has laid down a proverbial three-part test: the government may regulate commercial speech only if (1) the governmental interest underlying the regulation is "substantial," (2) the "regulation directly advances the governmental interest asserted," and (3) the regulation "is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566. Since laying down this test in *Central Hudson* the Court has applied it in a wide variety of cases challenging restrictions on commercial speech. *See, e.g., Greater New Orleans Broad. Ass'n, Inc.* v. *United States*, 527 U.S. 173 (1999) (striking down a federal ban on broadcast advertising for casinos); *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996) (invalidating a state statute that prohibited liquor stores from advertising the prices of their products); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995) (invalidating a regulation prohibiting beer labels from displaying alcohol content); *Edenfield*

v. *Fane*, 507 U.S. 761 (1993) (invalidating a regulation forbidding accountants from directly soliciting prospective clients).

But the Court has never applied *Central Hudson*, a test devised for the *regulation* of commercial speech, to review government actions *compelling* an individual or a business entity to engage in speech where, as here, such compelled speech is not necessary to prevent a company's own advertising from being deceptive. And with good reason.

The Court has expressed two justifications for affording the government more leeway in its regulation of commercial speech: (1) "the greater 'objectivity' of commercial speech justifies affording the State more freedom to distinguish false advertisements from true ones;" and (2) "the greater 'hardiness' of commercial speech, inspired as it is by the profit motive, likely diminishes the chilling effect that may attend its regulation." *44 Liquormart, Inc.* v. *Rhode Island,* 517 U.S. 484, 499 (1996) (plurality opinion). Neither has any relevance to government efforts to *compel* speech.

First, government compulsion of speech cannot logically advance the government's interest in preventing the dissemination of false advertising. The only speech at issue is compelled by the government. It follows that the compulsion can never be said to serve the purpose of preventing the dissemination of false or misleading statements.

Second, compelled commercial speech is no hardier than other forms of compelled speech. In one sense, all forms of compelled speech are extremely 'hardy' since they are backed by the force of law. Moreover, a chilling effect on voluntary speech is not one of the

dangers of compelled speech, whether commercial or noncommercial.

On reflection, it makes no sense to think of compelled subsidies in these terms. Treating the compelled financial support of speech about a commercial topic like "commercial speech" therefore turns out to be a category mistake.

> Although the State may at times "prescribe what shall be orthodox in commercial advertising" by requiring the dissemination of "purely factual and uncontroversial information," . . . outside that context it may not compel affirmance of a belief with which the speaker disagrees . . . . Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, . . . subject, perhaps to the permissive law of defamation. . . . Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.

Hurley v. *Irish-American Gay Group*, 515 U.S. 557, 573–74 (1995) (citations omitted).

Even apart from *Abood*, *Keller*, and their progeny, the Court has left no question that these principles equally apply to speech on the subject of commerce.

In *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n*, 475 U.S. 1 (1986) (plurality opinion), a privately owned utility company challenged a regulatory order requiring it to "include in its billing envelopes speech of a third party with which the utility disagrees." *Id.* at 4. Despite the fact that the utility company's billing statements had to do with commerce, the Court applied strict scrutiny, rather than the more relaxed *Central Hudson* standard, and concluded that the order was unconstitutional because it was "not a narrowly tailored means of furthering a compelling state interest." *Id.* at 21; *see also Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241 (1974) (holding that the First Amendment bars the government from compelling a newspaper to provide a sounding board for views other than its own).

With these decisions and their animating principles in view, it becomes crystal clear that the government and its *amici* are mistaken in their assertion that a compelled subsidy lies outside the ambit of First Amendment protection "unless the speech is political or ideological." Br. Amici Curiae American Mushroom Inst. 9; *see* Br. Pet. 16 n.9. It is the essential fact of government compulsion, not the accident of subject matter, that determines whether speech merits First Amendment protection.

A contrary interpretation of the First Amendment would lead to bizarre results. Regulation of commercial speech would proceed only if it satisfied the *Central Hudson* test, *see* 447 U.S. at 566, while governmentally compelled speech would receive no constitutional protection at all. Also, the government's position would relegate "compelled speech on a commercial topic" to the constitutional underworld of unprotected

speech, alongside obscenity and fighting words. *See Roth* v. *United States*, 354 U.S. 476 (1957) (obscenity); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942) (fighting words). Nothing in the text of the First Amendment or this Court's gloss on it supports such a result.

Next, the Mushroom Institute insists that "[a] compelled funding claim is thus far removed from the center of what the First Amendment prohibits." Br. Mushroom Inst. 10. On the contrary. As the Court acknowledged in *Abood*, a compelled funding claim like United Foods' implicates concerns "at the *heart* of the First Amendment." *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 234–35 (1977) (emphasis added). In *Abood*, for instance, the Court regarded forced contributions for purposes not germane to the maintenance of an exclusive bargaining system as profoundly violative of core First Amendment principles. *See id.* at 235.

The government's interpretation of the First Amendment, which would permit the government to compel financial support for any "nonideological" speech, must therefore be rejected. There remains the problem of identifying the correct rule of decision. If not the government's position, then what?

One aspect of the *Abood-Keller* test recently posed difficulties for the Court in *Board of Regents* v. *Southworth*, 529 U.S. 217 (2000). At issue there was "a First Amendment challenge to a mandatory student activity fee imposed" by the University of Wisconsin. *Id.* at 221. Certain students "contended that the University must grant them the choice not to fund those [student groups] that engage in political and

ideological expression offensive to their personal beliefs." *Id.* at 227.

As the Court readily acknowledged, *Abood* and *Keller* dictated that "students who attend the University cannot be required to pay subsidies for the speech of other students without *some* First Amendment protection." *Id.* at 231 (emphasis added). However, because "it is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning," *id.* at 232, the Court shied away from applying these decisions. Finding *Abood* and *Keller* "neither applicable nor workable in the context of extracurricular speech at a university," *id.* at 230, the Court turned to its public forum decisions, which it thought "instructive here by close analogy." *Id.* at 229–30. From these the Court drew the conclusion that the First Amendment rights of objecting students were adequately protected by "the requirement of viewpoint neutrality in the allocation of funding support." *Id.* at 233. Accordingly, the Court held that the University of Wisconsin could compel all students to financially support student organizations, so long as it adhered to the principle of viewpoint neutrality in distributing funds. *Id.* at 233–34.

Southworth injected considerable uncertainty into compelled speech doctrine by leaning on public forum analysis. *See The Supreme Court, 1999 Term—Leading Cases*, 114 Harv. L. Rev. 279, 285 (2000) (calling the public forum metaphor "a conceptually troubled categorical tool"). This is most clearly seen by comparing the constitutional claim pressed by the students with the Court's holding. The students pressed a claim to be exempt from funding the

university's objectionable speech, just as the claimants in *Abood* and *Keller* had done. *See id.* at 227. However, the Court "substitut[ed] equality for freedom of conscience," 114 Harv. L. Rev. at 287, by answering a compelled speech claim with the doctrinal non sequitur of viewpoint neutrality. *See id.* at 233-34.

In our opinion, this incongruency between claim and relief in *Southworth* can be explained by the Court's unwillingness (or inability) to apply a "germaneness" test to a public university. The Court itself conceded as much. "If it is difficult to define germane speech with ease or precision where a union or bar association is the party, the standard becomes all the more unmanageable in the public university setting, particularly where the State undertakes to stimulate the whole universe of speech and ideas." *Id.* at 232. Determining whether a particular activity is "germane" to the university's compelling interest in imposing a mandatory student fee would have required the Court to articulate a baseline purpose from which departures (at some unspecified point) constitute a First Amendment violation. *See Abood* v. *Detroit Board of Education,* 431 U.S. 209, 235–36 (1977); *Keller* v. *State Bar of California,* 496 U.S. 1, 13–14 (1990).

Because the Court was reluctant to identify a single "core" purpose served by a state university—doing so would have been tantamount to telling the university how to do its job—the Court faced a dilemma. The kind of factual analogies on which the Court had previously relied, *see Keller*, 496 U.S. at 12, broke down in *Southworth*. That case arose in an institutional setting wholly unlike unions and bar associations, which had given rise to the compelled subsidy cases in the first place, and the Court evidently regarded

the *Abood-Keller* test in this setting as a procrustean bed. At the same time, refusing to apply that test left the students' compelled subsidy claim without a satisfactory resolution.

Southworth thus revealed a defect in the *Abood-Keller* test. Inquiring whether compelled monies are devoted to "ideological activities not 'germane' to the purpose for which the compelled association was justified," *Keller* v. *State Bar*, 496 U.S. 1, 13 (1990), may appear natural when limited to unions, State bar associations, and other institutions that serve a single purpose justifying compelled association. However, as *Southworth* amply demonstrates, the germaneness inquiry becomes a distraction when applied to institutions for which such a single purpose cannot be fairly identified.

Viewpoint discrimination supplies only a makeshift solution. At best, it avoids a doctrinal problem of the Court's own making. At worst, it generates decisions that "appear unprincipled." 114 Harv. L. Rev. at 287.

Nor can the Court simply abandon the field. The Court's decisions interpreting the First Amendment leave no doubt that compelled subsidies raise grave constitutional concerns. *See, e.g.*, *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977); *Keller*, 496 U.S. at 9–10.

The better solution lies with a bit of doctrinal editing. As currently conceived, *Abood-Keller* comprises a three-part test. First, the government must demonstrate that the compulsory financial support serves some heightened government interest. *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 506, 519 (1991) (plurality). Second, the funded activity must be

"germane" to the government interest asserted as compelling. *Keller*, 496 U.S. at 13. Third, the compulsory funding scheme must be narrowly tailored to serve that compelling interest. *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 303 & n.11 (1986). Because the troubles stem from the second element of the test, it ought to be scrapped. The resulting test would have only two elements: proof of heightened government interest and the requirement of narrow tailoring. In other words, the *Abood-Keller* test ought to be replaced with strict scrutiny. Doing so would carry several advantages.

First, strict scrutiny fairly describes the level of judicial scrutiny applied in prior decisions. The Court has used different terms to describe the showing required of the government in demonstrating the importance of its challenged policy interest. While *Abood* itself was silent on the question, subsequent cases have required the government to identify an interest that is "vital," *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 506, 519 (1991), or "compelling." *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 303 n. 11 (1986). Whatever the precise verbal formulation, these decisions establish that the government bears an extremely heavy burden when it seeks to defend a program compelling the financial support of speech. Requiring the government to defend a compelled subsidy by producing a "compelling interest" thus finds sturdy precedential support.

Requiring the government to show that a compelled subsidy program is "carefully tailored to minimize the infringement," *id.* at 303, of free speech is likewise established by this Court's decisions. *Id.* at 303 n.11. Such an inquiry into the tailoring of means to ends

will allow the Court to assess the need for employing compulsory funding as a statutory or regulatory tool while avoiding the difficulties posed by asking whether a particular expenditure is "germane" to a compelling interest. In short, prior decisions point the way toward adopting strict scrutiny as the correct standard in compelled subsidy cases.[4]

Second, strict scrutiny rationalizes First Amendment jurisprudence. Not only does it make compelled speech doctrine internally consistent by laying subsidy cases like *Abood* and *Keller* on the same principled foundation as compelled speech cases like *Barnette* and *Wooley*. It also supplies a persuasive explanatory principle for reconciling the entire line of compelled subsidy cases, including spelling out the decisive distinction between *Machinists* v. *Street*, 367 U.S. 740 (1961) and *Abood*, or *Lathrop* v. *Donohue*, 367 U.S. 820 (1960) and *Keller*. A close reading of these decisions through the lens of strict scrutiny illuminates why the programs in *Street* and *Lathrop* were upheld and those in *Abood* and *Keller* were not. The government has a compelling interest in preserving the collective bargaining system and the integrated bar. *See Street*, 367 U.S. at 760–61; *Lathrop*, 367 U.S. at

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[4] One might object that applying strict scrutiny to compelled subsidies overlooks the "free rider" problem, on which this Court partly relied to uphold the exclusive bargaining system and the integrated bar. *See Abood* v. *Detroit Board of Educ.*, 431 U.S. 209, 222 (1977); *Keller* v. *State Bar of Cal.*, 496 U.S. 1, 12 (1990). However, the "free rider" problem does not represent an independent justification for compelling the financial support of speech. It only supplies a reason for concluding that such a program, when it serves a compelling interest, is narrowly tailored because allowing a free speech exemption would fatally undermine the program.

238. On the other hand, using mandatory dues for purposes not closely related to these ends fails the test of narrow tailoring. *See Abood*, 431 U.S. at 232, 235; *Keller*, 496 U.S. at 13–14.

Keller and *Abood* can thus be viewed as exercises in strict scrutiny. Certainly it is reasonable to say that the purposes found to justify compulsory speech in these cases—promoting industrial peace by preserving the system of collective bargaining and preserving the benefits of an integrated bar—qualify as compelling government interests. Moreover, the decisions make accentuate the point that spending money obtained through compulsion for purposes far removed from these central ends fails strict scrutiny, if only because such expenditures are not narrowly tailored.

Third, strict scrutiny avoids the difficulties posed by the germaneness test. Take *Southworth*, for instance. Applying strict scrutiny there would have allowed the Court to reach the same result while avoiding a Hobson's choice. The Court could have explained that the University of Wisconsin had identified a compelling interest in educating its students. On this point there could be little dispute. The salient questions would then focus on whether the compulsory student fee was narrowly tailored to the university's asserted interest. A reasonable answer would be for the Court to find that the university's program was narrowly tailored because a free rider problem threatened to undermine its entire student organization system, much as the free rider problem faced in *Abood* and *Keller*. In short, applying the strict scrutiny test would have enabled the Court in *Southworth* to resolve the objecting students' compelled subsidy claims without having to tell the university

what its "core" purposes are or shifting from a freedom-oriented claim to an equality-oriented remedy.

Fourth, strict scrutiny furnishes a universally-applicable, familiar, and workable rule of decision. Unlike the germaneness test, *see Keller*, 496 U.S. at 12, strict scrutiny does not depend on finding similarities between the institution from which a compelled subsidy arises and a labor union or bar association. It is therefore not so fact-dependant that it prevents the Court from fully vindicating the free speech claims brought in factual contexts far afield from labor unions and State bar associations.

For all these reasons, the Court should adopt strict scrutiny as the constitutional standard for assessing compelled subsidy cases. The rule would then be that the government may compel speech or financial support for speech *only if* it can demonstrate that its purpose for doing so is compelling *and* the means it has chosen are narrowly tailored to that end.

III. THE MUSHROOM ACT AND ORDER INFRINGE RESPONDENT'S RIGHTS UNDER THE FIRST AMENDMENT.

At issue here is indisputably a government order compelling United Foods to support speech with which it disagrees. The compulsion is unmistakable. The Mushroom Council, a creature of federal law, imposes an annual assessment on every grower and importer of mushrooms for the "fresh" market whose volume equals 500,000 pounds. 7 U.S.C. § 6102(9), 7 C.F.R. §§ 1209.11, .51, .52. Failure to comply with this annual assessment carries civil penalties up to $5,500. 7 C.F.R. § 3.91(b)(xxix).

United Foods objects to the Mushroom Act and Order for two reasons. First, it finds that a "generic, nationwide approach to promoting mushrooms . . . undermine[s] [its] effort to differentiate its Pictsweet brand from competitors, as well as its effort to tailor marketing to local retail conditions." Br. Opp. 4. Second, United Foods objects to advertising that "associate[s] mushrooms with consumption of alcohol and . . . tout[s] mushrooms as an aphrodisiac." *Id.*

Under the First Amendment the government may compel speech or financial support for speech only if it can demonstrate that its purpose for doing so is compelling and the means it has chosen are narrowly tailored to that end. The Mushroom Act and Order fail on both accounts.

The government's interest in promoting the consumption of mushrooms is not compelling. As *Amici* Mushroom Institute, *et al.* so aptly put it, the speech at issue in this case "is, after all, about mushrooms." Br. Amici Curiae Mushroom Institute, *et al.* Promoting mushrooms, however important to the national economy, *see* 7 U.S.C. § 6101(b), cannot be objectively placed on a par with other government interests previously deemed by this Court to be compelling. *See, e.g.*, *American Party* v. *White*, 415 U.S. 767, 783 n.14 (1974) (maintaining "the integrity of the electoral process"); *Snepp* v. *United States*, 444 U.S. 507, 509, n.3 (1980) (preserving "the secrecy of information important to our national security").

Even if the government's interest were thought compelling, the Mushroom Act and Order are not narrowly tailored to serve that interest. In this instance the compelled subsidy "significantly add[s]

to the burdening of free speech that is inherent in the allowance" of any amount of compulsory funding of expressive activity. *Lehnert*, 500 U.S. at 519 (plurality). Alternative means of supporting the generic marketing of mushrooms are available. Tax monies might be allocated for that purpose. Or the government might leave growers free to associate in voluntary cooperatives. *See* Br. Amicus Curiae Sun-Maid Growers, No. 95-1184 , 1995 U.S. Briefs LEXIS 1184 (arguing that voluntary cooperatives offer the advantages of scale without the costs of government compulsion). In short, if a marketing order requiring the largest mushroom growers in the country to fund generic advertising regardless of their individual views and interests qualifies as narrowly tailored, then "narrow tailoring must refer not to the standards of Versace, but to those of Omar the tentmaker." *Colorado* v. *Hill*, 530 U.S. 703; 120 S. Ct. 2480, 2507 (2000) (Scalia, J., dissenting).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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IN THE

Supreme Court of The United States

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
Petitioners,

v.

UNITED FOODS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF *AMICUS CURIAE* OF THE COALITION OF COTTON APPAREL IMPORTERS IN SUPPORT OF RESPONDENT SEEKING AFFIRMANCE

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QUESTION PRESENTED

Whether assessments imposed pursuant to the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101 *et seq.*, and similar programs such as the Cotton Research and Promotion Act, as amended, 7 U.S.C. § 2101 *et seq.*, to fund advertising programs designed to support crop producers violate the First Amendment rights of crop consumers who are required to pay such assessments?

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BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3(a) on written consent of all parties, the Coalition of Cotton Apparel Importers ("Coalition") respectfully submits this brief *amicus curiae* in support of Respondent.[1]

INTERESTS OF THE *AMICUS CURIAE*

Amicus curiae the Coalition of Cotton Apparel Importers is an unincorporated association of apparel retailers and other importers of cotton apparel products. The Coalition's members are all statutorily required, under the auspices of a U.S. Department of Agriculture ("USDA") order pursuant to the Cotton Research and Promotion Act amendments of 1990, to pay assessments to support a program of cotton advertising, research, and promotion, 7 U.S.C. § 2101 *et seq.* (the "Cotton Promotion Program").

The Coalition has a strong interest in protecting the First Amendment rights of its members, who each pay hundreds of thousands of dollars (or more) in annual assessments under the Cotton Promotion Program. The Cotton Promotion Program, like the Mushroom Program that is the subject of this appeal, compels commodity producers and importers to fund commercial speech—namely, advertising of the generic product (cotton, or mushrooms). Like Respondent, the Coalition's members believe that such assessments amount to compelled speech, in violation of the First Amendment.

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no person or entity other than the Coalition, its members, or its counsel has made any monetary contribution to the preparation or submission of this brief. Further, no counsel for Petitioner or Respondent authored this brief in whole or in part.

Moreover, while the Mushroom Program and the Cotton Promotion Program are two of many commodity advertising programs administered by USDA, the Cotton Promotion Program is unusual in its reach—it commands assessments not only from producers and importers of the commodity itself, but also from the commodity's downstream users: retailers who import cotton clothing (among their many products). Cotton product importers account for approximately one-third of the fees paid into the Cotton Promotion Program, or roughly $20 million of the Program's $60 million annual collections. *See* USDA Research & Promotion Task Force, *Report to the Secretary of Agriculture* 7 (1999).[2] Yet these entities have no interest in the promotion of cotton *per se*. As a result, they cannot be assumed to benefit from, much less agree with, the commercial speech that they are required to fund.

Accordingly, the Coalition files this brief in support of Respondent recommending affirmance of the decision of the U.S. Court of Appeals for the Sixth Circuit, which held that absent a comprehensive scheme of economic regulation pertinent to the commodity's promotion, the First Amendment precludes the exaction of such assessments. Cotton apparel importers are not the subject of the economic regulations that govern U.S. cotton production, and, the Coalition contends, cannot be required to fund speech for the benefit of those regulated producers.

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[2] Available online at <<http://www.ams.usda.gov/r&p/>>.

SUMMARY OF THE ARGUMENT

The freedom of speech secured by the First Amendment has long been recognized to encompass the freedom not to speak. *See, e.g., Miami Herald v. Tornillo*, 418 U.S. 241 (1974). Further, First Amendment protections apply not only to political speech, but also to truthful commercial speech. *See, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980). These guiding—and limiting—principles require that the holding of *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), which permitted the compelled funding of commercial speech in the context of comprehensive economic regulation of the tree fruit industry, be read narrowly. *Amicus curiae* contends that the U.S. Court of Appeals for the Sixth Circuit correctly did just that, holding that in the absence of comprehensive, collectivizing economic regulation, companies' First Amendment rights were violated by requiring them to fund others' commercial speech. *United Foods, Inc. v. United States*, 197 F.3d 221, 224-25 (6th Cir. 2000).

While firmly supporting affirmance of the Sixth Circuit's decision striking down the compelled speech provisions of the Mushroom Program, the Coalition respectfully urges the Court to recognize also that commodity promotion programs are in place for a wide range of industries and products. Some commodities may face more regulation than mushrooms, without achieving the level of collectivization possible in the tree fruit programs of *Wileman*. Moreover, some advertising programs sweep into their funding nets companies that are altogether outside the commodity's regulatory scheme (however comprehensive—or limited—it may be).

Amicus curiae respectfully urges the Court not only to affirm the decision below, but also to make clear that the constitutionality of compulsory commodity advertising programs can only be assessed on a case-by-case basis. If a complaining company is not directly governed by a truly comprehensive regulatory scheme, of which collective advertising is only a part, it cannot be required to speak or to pay for others to do so.

The Coalition also believes that the Solicitor General's new argument on appeal—that the Mushroom Program and others like it constitute "government" speech, immune from First Amendment scrutiny—is belied by the Secretary of Agriculture's failure to supervise and monitor the bodies allegedly speaking on his behalf. The Cotton Promotion Program's speech and activities, like those of most research and promotion programs, are essentially autonomous and outside USDA's control. Therefore, this speech should not be permitted to hide behind governmental immunities.

ARGUMENT

I. Absent Extensive Economic Regulation, Compelled Commodity Advertising Offends the First Amendment

This appeal presents the question whether companies and individuals may be required, against their will and their own assessment of their best interests, to pay for collective generic advertising of commodities in which they deal. This Court previously held that such commercial speech may be compelled in the context of a heavily regulated industry. *See Wileman*, 521 U.S. at 473. However, the United States now seeks to stretch *Wileman*'s holding beyond recognition. It would have this Court immunize *any* program compelling the funding of speech from First Amendment scrutiny, so long as the compelled speech in question is nonpolitical. The U.S.

Court of Appeals for the Sixth Circuit resisted such an expansive reading of *Wileman*, and the Coalition respectfully urges this Court to do the same.

A. The Court of Appeals Correctly Applied *Wileman* to the Mushroom Program

In common with many agricultural commodities, the fruit of California's orchards is potentially subject to a comprehensive network of federal regulations governing production, distribution, and pricing. *See Wileman*, 521 U.S. at 461, 469. The national fresh mushroom industry, on the other hand, is wholly unfettered by market regulations—but for one. Mushrooms are covered by a USDA-administered research and promotion program that extracts per-unit assessments from producers and importers to fund a program of generic mushroom advertising and promotion. *See United Foods*, 197 F.3d at 222.

For the former industry (tree fruit), collective advertising is yet another dimension of collectivizing economic regulation. For the latter (mushrooms), this compelled speech is the only applicable federal regulation. Outside the context of sweeping economic restraints, it is difficult to see compulsory advertising payments as anything other than straightforward governmental control of the payers' speech. Recognizing this, the Sixth Circuit Court of Appeals read this Court's precedents to protect mushroom producers' First Amendment rights and to invalidate the Mushroom Program.

The Sixth Circuit's holding in *United Foods*, 197 F.3d at 224-25, was based on a careful examination of the language and reasoning of this Court's opinion in *Wileman*. In that case, this Court held that California's collective tree fruit advertising program—a promotional program that complemented a wide array of marketing controls under

federal law—was subject to review as a variant of the economic regulations that "already constrained" the producers' "freedom to act independently." 521 U.S. at 469. In that context, the Court was able to sustain the requirement to fund tree fruit advertising, citing the advertising's nonpolitical nature, its non-attribution to particular producers, and the absence of restrictions on producers' other speech. *Id.* at 469-70.

The United States now seeks to divorce *Wileman*'s holding from the regulatory context on which the Court relied so heavily. So long as the content of advertising or other compelled speech is nonpolitical, the government argues in effect, Congress and USDA may impose a requirement to pay for any speech on any industry or any company in reach of the Commerce Clause, without fear of treading on the payers' First Amendment rights. *See* Petitioners' Br. 16-17 & n.9. That reading asks the Court to treat extensive portions of its own precedential opinion as irrelevant.

The Coalition believes, substantially for the reasons stated by Respondent, that the Sixth Circuit accurately and fairly applied *Wileman* to find that compulsory advertising could not be justified as a component of economic regulation in an otherwise unregulated industry. Without extensive regulatory collectivization, the mushroom advertising requirement's free speech effects cannot be justified and cannot be reconciled with the First Amendment.

B. Case-by-Case Assessment Is Critical to Evaluating the Constitutionality of Commodity Advertising Programs

The Coalition respectfully contends, however, that the jurisprudence of compelled commercial speech will remain unsettled unless the Court clarifies the proper approach for

evaluating the constitutionality of other like programs. Few commodities are as free from regulation as mushrooms; few are as directly regulated as California tree fruit. A holding that unregulated companies or an unregulated industry may not be subjected to collective advertising assessments, without more, would offer little guidance to USDA or to companies in other industries, including downstream users of commodities, who are subject to promotional assessments. Accordingly, the Coalition requests that the Court not only adopt the Sixth Circuit's focus on regulatory context, but also make clear that the constitutional significance of that regulatory context can only be determined through case-by-case analysis.

As the United States notes, numerous commodities are subject to generic advertising programs, including cotton, 7 U.S.C. § 2101 *et seq.*, potatoes, 7 U.S.C. § 2611 *et seq.*, eggs, 7 U.S.C. § 2701 *et seq.*, beef, 7 U.S.C. § 2901 *et seq.*, dairy products, 7 U.S.C. § 4501 *et seq.*, pork, 7 U.S.C. § 4801 *et seq.*, and fluid milk, 7 U.S.C. § 6401 *et seq.*, among many, many others. They vary, however, in the degree to which the industries are already constrained by comprehensive regulatory schemes. Careful, case-by-case assessments will be required to determine whether entities with First Amendment complaints are in fact subject or potentially subject to the kind of sweeping economic regulation that overcame such complaints in *Wileman*. Only case-by-case assessments can legitimately determine whether, for example, telling regulatory features such as antitrust exemptions, uniform pricing, quantity restrictions, grading specifications, pooling, and surplus purchase and disposal schemes, *Wileman*, 521 U.S. at 461, are present.

It is also particularly important to note that the question should not turn solely on the degree of regulation governing the production of the commodity itself. The better question is whether the complaining party, whose First Amendment

rights are at issue, is otherwise subject to comprehensive economic regulation that justifies the free speech burdens of collective advertising. While for many commodity programs this distinction may matter little to the result, for others it may be decisive.

The Cotton Promotion Program clearly illustrates the importance of properly framing the necessary case-by-case inquiry. Historically, raw cotton production in the United States has occurred within a complex web of federal regulations, including payments to reduce cultivated acreage, price supports, and other subsidies. *See generally,* GAO Report 95-107, *Cotton Program: Costly and Complex Government Program Needs To Be Reassessed* (1995). In recent years, the complexity and cost of these programs has pushed Congress to favor less comprehensive economic controls. *See* H.R. Rep. No. 104-462 at 40 (1996), *reprinted in* 1996 U.S.C.C.A.N. 611, 612 (describing "new era of market-oriented Federal farm policy" under later-titled Federal Agriculture Improvement and Reform Act, Pub. L. 104-127, 110 Stat. 888 (1996)).

Cotton regulations presently include the Cotton Promotion Program, as amended in 1990, which mandates assessments to fund a generic advertising, research and promotion program to "strengthen cotton's competitive position and to maintain and expand domestic and foreign markets and uses for United States cotton." 7 U.S.C. § 2101. Importantly, however, those assessments are collected not only from raw cotton producers and importers (as in the Mushroom Program), but also from certain classes of downstream cotton consumers—such as importers of cotton apparel products, including retailers and their importing

middlemen, who operate in a completely separate stream of commerce from raw cotton producers.[3]

Whether or not U.S. production of cotton is subject to regulation sufficient to meet *Wileman*'s criteria (and recent Congressional history scaling back agricultural supports suggests not), it is undisputed that such raw cotton collectivization (if any) does *not* extend to or implicate the cotton product importers. Cotton product retailers have no antitrust exemptions, uniform pricing, grading specifications, pooling, or surplus purchase and disposal schemes, *Wileman*, 521 U.S. at 461. To the contrary, apparel retailing is one of the most open and competitive businesses in the country.

Under the Cotton Promotion Program, however, product importers' First Amendment rights are impaired by compulsory cotton advertising, even though these payers have no part in the regulatory scheme governing raw cotton production. Just like the mushroom producers in *United Foods*, they are not otherwise regulated under the commodity scheme. And absent such comprehensive regulation that "already constrain[s]" their "freedom to act independently," *Wileman*, 521 U.S. at 469, infringements on product importers' First Amendment rights cannot be tolerated.

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[3] *See* 7 U.S.C. § 2116(c) (defining "cotton" for purpose of importers' assessments to include "cotton content of the products derived from...cotton"); 7 C.F.R. § 1205.335(b) (assessments on imports per "bale equivalent" in cotton products). Importers and retailers of products containing cotton (including *amicus* Coalition's members) were not brought within the Cotton Promotion Program's reach until 1990. At that time, Congress amended the Program to make the previously voluntary assessments mandatory, and, in order to boost the Program's funding, to collect them also from importers of downstream cotton products such as apparel. Those changes were implemented in a referendum process in 1991. *See* 7 U.S.C. §§ 2107(b), 2110(b).

Likewise, at least for cotton product importers, it is not possible to take refuge in the notion that generic cotton advertising "further[s] the interests of those who pay for [it]," *id.* at 462 n.3. While such advertising may increase demand for cotton products, it may very well do so at the expense of products made from other fibers, such as man-made fibers, wool, and silk, that importers and retailers also purchase for sale in stores.[4] The cotton advertising that apparel importers are forced to fund may very well reduce sales of those same importers' other (and potentially higher-value) product lines. Apparel importers are thus required to fund potentially self-injurious commercial speech for the benefit of an industry (raw cotton production) in which they do not participate.

Careful framing is therefore required to ensure, *first*, that courts undertake a case-by-case inquiry into the broader

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[4] U.S. Census Bureau aggregate trade statistics show, for example, that in each of the last two years, 1999 and 2000, imports of products principally made of man-made fiber were on a par with imports of products containing cotton. Thus, of almost 33 billion square meter equivalents of textile and apparel products imported into the United States in 2000, approximately 13 billion square meter equivalents were cotton and another 13 billion square meter equivalents were man-made fibers. U.S. Census Bureau, Foreign Trade Imports CD-ROM (Year Ending December 2000). Imports of wool, silk or non-cotton vegetable fiber (such as jute or linen) products accounted for a smaller share of total textile and apparel imports, but the net result is that products containing cotton account for less than half of the textile and apparel goods imported by companies such as those in the Coalition. *Id.* A review of apparel imports alone indicates that imports of apparel principally made of cotton account for slightly over half of total apparel imports, approximately 8 billion square meter equivalents of the just over 15 billion square meter equivalents imported in 2000. *Id.* A very substantial portion of apparel importers' products, then, are potentially adversely affected by generic cotton promotion programs.

regulatory context of each compulsory commodity advertising program, and *second*, that they look to the regulations affecting the paying company, rather than the commodity in general, when considering whether the payer's First Amendment rights are violated.

II. Government Control, a Prerequisite of Government Speech, Is Lacking Here

In its brief on the merits, the United States has introduced a legal theory not addressed by the court below: it argues now that the Mushroom Program's advertising constitutes "government speech" not susceptible to First Amendment limitations. That argument rests, however, on a flawed understanding of the government's control (or lack thereof) over commodity advertising programs.

The United States contends that the Mushroom Council, the board established by statute to administer the Mushroom Program, 7 U.S.C. §§ 6103-05, is a governmental entity for First Amendment purposes under *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 400 (1985). Citing statutory features of the Mushroom Council that are mirrored in a wide assortment of other commodity advertising programs—and focusing particularly on provisions providing for oversight and control by the Secretary of Agriculture—the government argues that any speech by the Council constitutes "government speech," not the speech of the producers and importers who are required to fund it.

At the heart of *Lebron*'s "government speech" analysis, however, is the basic notion that the speech of statutorily created bodies is attributable to the government because those bodies are controlled by the government. That simple connection is severed, however, by the evidence surrounding commodity promotion programs. Notwithstanding the *de jure* indicia of USDA control on which the government relies

so heavily, the factual record tells a very different tale—one that should give any court pause before immunizing commodity boards from First Amendment scrutiny.

Boards similar to the Mushroom Council are in place for each commodity advertising program established pursuant to a USDA order. However, USDA's oversight of those boards, and in turn the boards' oversight of the companies or entities conducting the generic advertising campaigns, is extremely limited, particularly in instances in which the law compels the board to work with a single contractor to perform all of the program's research and promotion work.

For example, under the express terms of the Cotton Research and Promotion Act, the Cotton Board is required to contract for its programs with an entity whose board of directors is composed solely of cotton producers. 7 U.S.C. § 2106(g). There exists only one such entity, Cotton Incorporated, which therefore has always been the Cotton Promotion Program's only contractor. This single-source contractor operates independently of the Cotton Board, even though to the public it may be perceived as synonymous with the Cotton Promotion Program because Cotton Incorporated's name appears on all Program advertising.

In addition, as a consequence of its single-source status, Cotton Incorporated receives almost all monies collected from producers and importers under the Program. The Cotton Board's (and through the Board, USDA's) only ability to control the actions and speech of this private contractor is through the annual process of reviewing a Program budget that is prepared by Cotton Incorporated. As a practical matter, this process is a rubber stamp; the Board has little leverage to exercise over the producer-controlled Cotton Incorporated, when by law the latter is guaranteed the continuing business of the Cotton Promotion Program. Moreover, in those rare instances in which Cotton

Incorporated's promotional expenditures have been questioned by some members of the Cotton Board, Cotton Incorporated has relied on other non-Board-controlled funds to proceed with those activities over Board member objections.[5]

Notwithstanding the statutory texts, as a *de facto* matter USDA's control over commodity boards, and the boards' control of their contractors, has come up wanting. To the extent that they function independently, free from serious official oversight, these boards and their contractors are not properly cloaked with the "government" mantle.

CONCLUSION

For the foregoing reasons, *amicus curiae* the Coalition of Cotton Apparel Importers respectfully asks this Court to affirm the judgment of the court of appeals that the Mushroom Program's compulsion of commercial speech by entities not subject to collective economic regulation violates the First Amendment.

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[5] A case in point is the Cotton Incorporated gala ball at the Metropolitan Museum of New York, which has an annual price tag of nearly half a million dollars. In 1999, in the face of criticism by Cotton Board members and others that the expense was inappropriate, Cotton Incorporated nevertheless utilized some of its own funds and proceeded to hold the event—and, therefore, to "speak" for cotton producers and importers. *See, e.g.,* Sharon Walsh, "Spending Hidden by a Cotton Curtain; Farmers' 'Promotional' Fees Used for Golf, Topless Dancing, Alcohol," *Washington Post* A1 (Nov. 25, 1998).

Respectfully submitted,

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